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Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD L. DUGGER, Secretary, Florida Department of Offender Rehabilitation
Petitioner,

v.

JON S. MILLER,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

AND APPENDIX

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## QUESTION PRESENTED

WHETHER IN DETERMINING THE "KNOWING AND INTELLIGENT" ASPECT OF A MIRANDA WAIVER, THE LOWER COURT'S DECISION CONFLICTS WITH COLORADO V. CONNELLY, 479 U.S.___, 107 S.CT. 515 (1986), BY REQUIRING MORE THAN AN OBJECTIVE MANIFESTATION OF THE DEFENDANT'S UNDERSTANDING OF HIS RIGHTS.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in Miller v. Dugger, is reported at 538 F.2d 1530 (11th Cir. 1988). It is reproduced in the appendix at A-1 et seq.

## JURISDICTIONAL STATEMENT

On March 10, 1988, the United States Court of Appeals for the Eleventh Circuit vacated an order of the district court denying a petition for writ of habeas corpus brought by a state prisoner pursuant to **28 U.S.C. §2254** and remanded this cause to the district court. This petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is being filed within 60 days from the date the Eleventh Circuit entered its opinion. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of **Rule 17** of the **Rules of the Supreme Court, Title 28 U.S.C. §1254(1).**

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Amendment V** of the **Constitution of the United States** provides, in pertinent part, that:

> . . . [N]or shall any person . . . be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; . . ..

**Amendment XIV, §1,** of the **Constitution of the United States** provides, in pertinent part, that:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ..

## STATEMENT OF THE CASE

The respondent, Jon S. Miller, is an inmate of the Florida Department of Corrections. He was indicted by the Grand Jury of Lee County, Florida, and charged with the murder in the first degree of Mrs. Alexandra Todd. After a trial by jury, the respondent was found guilty as charged and was sentenced to death, said death sentence being subsequently overturned by the Florida Supreme Court and a life sentence was imposed.

At trial, the state sought to introduce Miller's taped confession which was given in the presence of a police officer and an investigator for the State Attorney's Office. (R 192, 975) There is no question that Miller was read his Miranda rights or that Miller stated he understood his rights. There is also no question that Miller repeatedly stated that he wished to speak with the law enforcement officers. (R 975, et

seq.; Appendix at A - 68 et seq.). The sole basis upon which Miller's trial counsel objected to the admission of the taped confession was that Miller was insane and could therefore not knowingly, freely and voluntarily waive his right to remain silent. (R 77, 83) No allegation was made by Miller that the police officers used coercive tactics, either psychological or physical, in obtaining the confession. There was no allegation of any police overreaching whatsoever. Both the district court and the Eleventh Circuit Court of Appeals found that no improper police conduct occurred when eliciting the statement from Miller. Miller v. Dugger, 834 F.2d 1530, 1535, 1537 (11th Cir. 1988). For the convenience of the Court, incorporated within the Appendix at "A - 68" et seq. is a copy, in its entirety, of the taped confession elicited from Miller the night of the murder. The trial court permitted the state

to introduce the taped confession into evidence.

Prior to the obtaining of the confession, Miller had been arrested and transported to the Lee County jail. At first, Miller acted perfectly normal, but then told the police that an atomic bomb was about to explode. (R 180) However, as explicitly found by the Eleventh Circuit Court of Appeals, neither the police officer or the State Attorney's investigator who obtained the confession were aware that Miller had been warning the police about the impending explosion of a atomic bomb. Miller v. Dugger, 834 F.2d 1530, 1532, note 3. (11th Cir. 1988). Significantly, following his arrest for first degree murder, Miller was placed in a cell with, among others, Benny Johnson. Only several hours after his arrest, Miller admitted his crime to Mr. Johnson. In addition, Mr. Johnson testified that Miller intended to say he was crazy. (R 203 - 204)

With respect to the admission of the taped confession, the Eleventh Circuit Court of Appeals found that admission of the recording was harmless error as to Miller's factual guilt. Miller v. Dugger, 838 F.2d 1530, 1541 - 1542 (11th Cir. 1987). However, the Eleventh Circuit Court of Appeals found that where the state used the contents of Miller's taped statements to cross-examine defense experts and to elicit testimony from the state's expert witness, error in admission of the confession was not harmless. Miller v. Dugger, 838 F.2d 1530, 1543 - 1544 (11th Cir. 1988). The Eleventh Circuit held that admission of Miller's confession without first deciding that Miller had made a valid waiver of his Miranda rights was erroneous. Although the Eleventh Circuit found that Miller's confession was voluntary, the court determined that, if there was a question as to Miller's sanity at the time he made his

confession, the trial court should have determined whether Miller intelligently waived his Miranda rights.

## BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction in the court of first instance was a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254.

## REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW, IN ADDITION TO CONFLICTING WITH COLORADO V. CONNELLY, 479 U.S. ___, 107 S.CT. 515 (1986), RAISES IMPORTANT QUESTIONS CONCERNING THE VALIDITY OF MIRANDA WAIVERS WHICH NECESSITATES THE AUTHORITATIVE VOICE OF THIS HONORABLE COURT.

## ARGUMENT

The essence of the decision rendered by the United States Court of Appeals for the Eleventh Circuit was, inter alia, that the trial court erred by admitting respondent Miller's confession without first determining whether Miller was competent to effect a valid waiver of his Miranda rights.[1] In so

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[1] Implicit in the trial court's ruling was a finding that Miller validly waived his Miranda rights. The record in the instant case reveals extensive testimony by Sergeant Harry M. Morse, one of the law enforcement officers who obtained Miller's confession, concerning the circumstances surrounding the eliciting of the statement. (R 75 - 82; 88 - 89) The trial court permitted introduction of the taped confession after hearing this testimony. However, no argument as to this point will be made in this petition for writ of certiorari inasmuch as our petition presents as the sole question for resolution by

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holding, we submit that the Eleventh Circuit Court of Appeals has set forth a standard for determining the "intelligence" of a waiver which does not comport with Constitutional dictates.

The respondent, Jon S. Miller, is an inmate of the Florida Department of Corrections who was convicted of the First Degree Murder of Mrs. Alexandra Todd. The night of the murder, Miller gave statements to two law enforcement officers which, although not technically inculpating, were used by the prosecution to rebut Miller's insanity defense. See Miller v. Dugger, 838 F.2d 1530, 1542 - 1544 (11th Cir. 1988). The confession was made to law enforcement officers who were not given any indication that Miller might have

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this Honorable Court the efficacy of a Miranda waiver by a suspect who objectively manifests his understanding of the Miranda rights and who objectively manifests his desire to waive those rights.

been suffering from a mental defect. Rather, a review of the transcript of the taped confession (included in the appendix at A - 68 et seq. for the Court's convenience) reveals only that Miller was given his Miranda rights several times and that Miller stated he understood his rights and that he repeatedly wished to speak with the law enforcement officers. At trial, however, Miller objected to the introduction of the taped confession and alleged that he was insane and could not therefore knowingly, freely and voluntarily waive his right to remain silent. (R 77, 83) Although the Eleventh Circuit Court of Appeals held that, based upon these facts, it had not been determined that Miller knowingly and intelligently waived his Miranda rights, specifically the right to remain silent, your petitioner submits otherwise and would assert that there was no indication that Miller was compelled to offer testimony against

himself. The prophylactic rules of Miranda were designed to vitiate the presumptive coercion arising from custodial interrogation. As this Court explicitly recognized in Colorado v. Connelly, 479 U.S. ___, 107 S.Ct. 515, 93 L.Ed.2d 473, 486 (1986): "The sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion." With that precept in mind, we submit that the "intelligence" required of a criminal suspect is only that degree which demonstrates that the confession has not been coerced. Competency to confess is not an issue arising under the United States Constitution. The ultimate question is whether the confession has been obtained without coercion or police compulsion.

Your petitioner would concede that Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny appear to require a knowing and intelligent waiver of the right against

self-incrimination. This case presents the question as to the degree of intelligence that must be demonstrated to effect a valid waiver. We would submit that as long as the record demonstrates an objective manifestation of the understanding of the Miranda rights and a waiver of those rights, noncompulsion is established.

The lower court's ruling, however read, employs a subjective standard in determining the validity of a waiver. This subjective standard is completely unworkable and not required by the Fifth Amendment. Former Chief Justice Burger recognized "the inherent practical obstacle of one person's being unable to know with certainty the contents of another's mind." United States v. Ceccolini, 435 U.S. 268, 282 (1978) (Burger, C.J., concurring). Cf. Murch v. Mottram, 409 U.S. 41 (1972) ("A state prisoner may not deliberately 'elect' not to comply with the

interpretation of the state procedural statute by the state court and then assert in federal court that no rights were waived because he did not have the subjective intent to waive his constitutional claims)". We submit that the lower court's ruling requires state officials to go beyond the dictates of Miranda when eliciting a confession. Law enforcement officers should not be required to inquire into and determine with exactness the subjective state of a defendant's mind. Indeed, law enforcement officers are not trained to act as mental health experts so as to be able to ascertain that a suspect who unequivocally waives his right to remain silent nevertheless did not have the mental capacity to do so. It is unreasonable and not constitutionally required for a police officer or a trial judge to ascertain the quantum of intelligence possessed by a suspect who acknowledges that he understands his rights and

understands the consequences of abandonment of those rights.

In Colorado v. Connelly, supra this Honorable Court held that:

> "There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the Miranda waiver context than in the fourteenth amendment confession context.

Connelly, 93 L.Ed.2d at 486. Of course, this Court in Connelly held that, absent police coercion, a confession by a suspect who might have had a mental defect is voluntary in the constitutional sense. To require a stricter standard to demonstrate a waiver of Miranda rights, as does the Eleventh Circuit in its opinion rendered in the instant case, then to demonstrate the voluntariness of a confession does not comport with the dictates of logic given that "the sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion."

In Moran v. Burbine, 475 U.S. 412, 422 - 423 (1986), this Court held that:

> . . . Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand moot and request a lawyer, and that he was aware of the State's intention to use his statements to secure conviction, the analysis is complete and the waiver is valid as a matter of law.

We submit that Moran v. Burbine, and Colorado v. Connelly seem to indicate that once Miranda rights have been given and a criminal suspect indicates his willingness to proceed with a statement, that statement, absent police coercion, is voluntarily given and the waiver of rights is freely and intelligently given. We further submit that Connelly indicates that, in the Miranda waiver context, voluntariness (and the consequent absence of police coercion) is the crucial question to

be answered when determining the efficacy of a waiver. However, if this question was not addressed in Connelly, the instant case squarely presents this issue.

Our request for this Honorable Court to clarify the "knowing and intelligent" requirements of a valid Miranda waiver does not imply that the mental condition of a criminal suspect is to be accorded no consideration. Rather, as this Court indicated in Connelly, the mental condition of a suspect is relevant to an individual's susceptibility to police coercion. Colorado v. Connelly, 93 L.Ed.2d at 483. However, unless police officials somehow employ coercive tactics predicated upon knowledge of a suspect's mental infirmity, the rights accorded by our Constitution are not violated.

The interrogation undertaken by the law enforcement officers in the instant case illustrates why this Honorable Court should

accept certiorari of this cause and find that an objective manifestation of the understanding of the Miranda rights and an objective waiver of those rights satisfies the requirement of the Constitution that a person not be compelled to be a witness against himself. A review of the transcript of the interrogation reveals that the law enforcement officials conducting the interrogation made sure that Miller understood his rights. Miller was informed of all the rights delineated in Miranda and the law enforcement officers ascertained that Miller understood those rights. Because Miller repeatedly stated that he understood his rights and that he nevertheless wished to talk with the officers, there is no indication in this record that Miller failed to understand what the officers told him. Miller clearly expressed on several occasions his willingness to waive his rights and continue the

interrogation. The officers had no indication that Miller was of insufficient intelligence tc understand the rights he was waiving or what the consequences of his waiver would be. Both lower courts found that the officers used no coercive tactics or elements of overreaching in obtaining the statements from Miller.

Because Miller objectively manifested his knowledge of the Miranda rights and because Miller objectively manifested his waiver of those rights, no purpose would be served by suppressing Miller's statements in order to enforce Constitutional guarantees. Colorado v. Connelly, 93 L.Ed.2d at 484, citing United States v. Leon, 468 U.S. 897, 906 - 903 (1984). We therefore submit that Miller's confession was admissible under the United States Constitution where Miller effected a valid waiver after being advised of his rights and the consequences of the

abandonment of those rights. Although the objective manifestation by Miller that he understood his rights and waived those rights should render his confession admissible, we do not contend that the weight to be accorded his confession should not be a matter for consideration by the jury. The weight to be accorded a confession, and not the admissibility thereof, is a valid concern where a defendant interposes an insanity defense to a criminal charge. However, the mere fact that a criminal suspect may have had a mental defect does not render his objectively manifested waiver of Miranda rights ineffectual.

## CONCLUSION

For the above and foregoing reasons, your petitioner respectfully urges this Honorable Court to grant certiorari and reverse the decision of the Court of Appeals in and for the Eleventh Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I ROBERT J. KRAUSS counsel for petitioner and a member of the Bar of the United States Supreme Court, hereby certify that on the 25th day of April, 1988, I served three copies of the Petition for Writ of Certiorari to the Supreme Court of Florida on John A. Tucker, Esq. CAVEN, CLARK & RAY, P.A., Suite 3306, One Independent Square, Jacksonville, Florida 32202, by a duly addressed envelope with postage prepaid.

Robert J. Krauss

ROBERT J. KRAUSS
Assistant Attorney General
COUNSEL FOR PETITIONER

Case No.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT**

APPENDIX

**Jon S. MILLER, Petitioner-Appellant, Cross-Appellee,**

**v.**

**Richard L. DUGGER, Respondent-Appellee, Cross-Appellant,**

**No. 86-3405.**

United States Court of Appeals, Eleventh Circuit.

March 10, 1988.

Defendant convicted of first-degree murder and sentenced to life imprisonment petitioned for writ of habeas corpus. The United States District Court for the Middle District of Florida, No. 83-125-Civ-FtM-10, Wm. Terrell Hodges, Chief Judge, denied writ. On appeal, the Court of Appeals, Kravitch, Circuit Judge, held that: A record did not demonstrate facts that would have entitled defendant to **Jackson-Denno** hearing on issue of voluntariness of statements he had made on night of murder, but state trial court had erroneously admitted those statements without

prior determination of validity of defendant's **Miranda** waiver; (2) admission of tape recording of those statements was harmless error as to defendant's factual guilt in light of strong circumstantial evidence, but was harmful as to insanity defense; and (3) remand to district court for further proceedings on issue of relief was warranted.

Vacated and remanded.

1. **Constitutional Law 226.1(1,5)**

Due process requires not only that conviction not be based on involuntary confession but also that **Jackson-Denno** hearing be held when defendant contests voluntariness of his statement. U.S.C.A. Const. Amends. 5,14.2. **Habeas Corpus 54**

For habeas petitioner to be entitled to relief from state court's failure to hold **Jackson-Denno** hearing, he must allege some facts that would indicate involuntariness of his confession. U.S.C.A. Const. Amends. 5, 14.

**3. Criminal Law 519(9)**

Confession given by defendant on night of murder was voluntary for purposes of determining admissibility of tape recording thereof, in absence of over-reaching by interrogating officials; even if interrogators knew that defendant might have mental problems, they did not exploit that weakness with coercive tactics by subjecting defendant to interrogation of exhausting long duration, applying physical force or threat thereof, or making any promises of reward.

**4. Court 100(1)**

Rule of **Edwards v. Arizona**, requiring cessation of police interrogation once suspect indicates wish to speak to an attorney, is not to be retroactively applied.

**5. Criminal Law 525**

Trial court should not have admitted uncoerced confession of defendant who appeared to be mentally ill without first deciding if

he had validly waived his **Miranda** rights. U.S.C.A. Const. Amend. 5.

**6. Criminal Law 1168(2)**

Erroneous admission of tape recording of defendant's uncoerced murder confession without determination of whether he had validly waived his **Miranda** rights was harmless as to defendant's factual guilt, but not on issue of insanity defense; circumstantial evidence of defendant's guilt was strong, but state used contents of defendant's taped statements, as well as sound of defendant's voice to establish defendant's insanity. U.S.C.A. Const. Amend. 5.

**7. Criminal Law 625**

Determination of whether district court can hold meaningful retrospective competency hearing is necessarily made on case-by-case basis, and relative factors are passage of time, availability of witnesses and existence of evidence on state record about defendant's mental state at that time.

8. **Habeas Corpus 113(18)**

Remand of habeas proceeding to district court for further proceedings on issue of relief was warranted where state trial court admitted defendant's uncoerced statement without determining whether it had been given after knowing and intelligent waiver of **Miranda** rights and that statement had been harmfully used to demonstrate defendant's sanity. U.S.C.A. Const. Amend. 5.

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Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

KRAVITCH, Circuit Judge

I.

Jon Miller, the petitioner and appellant in this case, was released from jail in Lee County, Florida, on December 22, 1970.[1] That afternoon, Miller took a taxi driven by Margaret Louise Sessions from downtown Fort Myers to Fort Myers Beach. At the Beach Marina, Miller purchased from Stancil Ollis a stainless steel fillet knife with a six to eight-inch blade. Miller's behavior raised suspicions in Ollis, who described Miller as "sort of wild looking," and in Darrell Coleman, who witnesses the purchase. Coleman decided to follow Miller as he walked across a bridge from Beach Marina to the beach, back across the bridge to the marina, into the Surf Club bar, and finally into another bar

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[1] At the time of the crime, Miller went by the name of Robert Christopher, and he is frequently referred to in the record as Christopher.

called the Mermaid Club. While Miller was in the Mermaid Club, Coleman telephoned the sheriff's office.

About fifteen minutes later, Miller left the Mermaid Club and got into the back seat of a taxicab driven by Alexandra Todd. Todd drove the cab across the bridge to a trailer that served as the taxicab office, where she and Miller changed cabs. Todd then drove Miller towards Fort Myers. Coleman attempted to follow the taxi, but he was thwarted by traffic, so he went back to the taxicab office to alert the manager, Todd's husband. Todd's husband tried to contact Todd by radio, but she did not respond.

That evening Todd's body was discovered inside her taxi in a parking area near the Lee County Commodity Warehouse. The police found Todd's body on the right (passenger) side of the front seat. An autopsy revealed that Todd had been stabbed several times in

the front and back; one of the stab wounds was six inches deep. Tests disclosed the presence of fresh sperm inside Todd's vagina. Although the police did not find the murder weapon or any clothing that might have belonged to Miller, they did discover Miller's palmprint on the steering wheel of the taxicab.

Meanwhile, at about 5:55 P.M. that same afternoon, Miller walked out of a wooded area near Gibson's Department Store in Fort Myers and approached Joe Roberts in the store parking lot. Miller was not wearing a shirt at the time. Miller gave Roberts five dollars and asked him to purchase a T-shirt for him. Roberts did so and then gave Miller a lift into downtown Fort Myers.

Approximately three hours later, Officer Charles Enderle arrested Miller in Fort Myers bus station. Miller's clothes were removed at the Lee County jail. His trousers had a

large amount of blood on the upper legs; paper money in the pockets also was stained with blood.[2] Enderle testified that at first Miller behaved normally, but at the jail Miller repeatedly told the police that an atomic bomb was about to explode.

Miller was interrogated by David Schmirler, an investigator in the State's Attorney's Office, and by Sergeant Harry Morse, of the Lee County Sheriff's Office.[3] Morse administered **Miranda** warnings to Miller. Miller first stated, "I receive the vibrations, I mean I received the -- the

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[2] Miller and Alexandra Todd had the same blood type, A+.

[3] The record does not indicate that either Schmirler or Morse knew that Miller had been warning the police about the impending explosion of an atomic bomb. Miller did tell Schmirler and Morse during the interrogation that "Well, I've been mentally -- I'm very mentally disturbed." Schmirler replied, "Yeah, I understand" and then changed the subject.

that I could remain silent, but I understand your attitude, and I -- I decided I'd like to [inaudible]." Miller then acknowledged that he understood the rights. Miller proceeded to answer some questions asked by Morse, but his answers for the most part were "Yeah" or "Uh huh." Later, however, when Morse reminded Miller of his rights, Miller appeared confused and disoriented. As Schmirler and Morse pressed Miller into signing a form stating that he understood his rights, Miller became more passive and uncooperative. Miller did tell the questioners that he remembered taking a taxicab to Fort Myers Beach, having a few drinks, getting into a taxicab driven by a woman and changing cabs. Miller did not remember anything else that happened and he woke up in a puddle of water, walked to a parking lot, met a young man whom he asked to buy T-shirts for him, and hitch-hiked into Fort Myers.

After his indictment for the murder of Alexandra Todd, Miller was adjudicated incompetent to stand trial and was confined for two and one-half years at the Florida State Hospital.[4] On December 14, 1973, the Florida trial court adjudicated Miller competent to stand trial. At trial, Miller relied principally on the defense of insanity. When the state sought to introduce a tape of the statement that Miller had made to Schmirler and Morse during their interrogation of him on the night of Todd's murder, defense counsel objected because Miller "could not

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[4] Miller had a history of mental illness. According to his own testimony at his trial, he abused drugs during the 1960's and later had sensations of being "burned out" and feelings that his consciousness was removed from his body. He had undergone psychiatric treatment in New York in the early 1960's had then traveled to Chicago and San Francisco because he feared that others wanted to kill him. He was hospitalized in San Francisco and in Tampa for mental problems and was given psychiatric treatment during a period of improvement in Massachusetts.

knowingly and voluntarily . . . . " whereupon counsel was cut off by the trial court. A few minutes later, defense counsel again objected to the introduction of the tape. The following discussion ensued:

> MR. GRACE [Defense Counsel]: If it please the Court, I would be willing to call the officers, Chuck EnderLe and Officer Hawkins at this point for the purpose of showing that he didn't understandingly waive his rights.
>
> THE COURT: This question of voluntariness is a question, if it appears to be voluntary, it's not a question for the Court, it's a question for the jury to determine whether or not it's voluntary; and I think prima facie the State has had a proper case to introduce this statement, whatever it may be. Prima facie it appears to the Court that whatever was done was voluntary after the full Miranda warning. And I'm going -- I think this is a question to be presented to the jury.

MR. COUSE [Prosecutor]: We'd be glad to play the tape for Your Honor if Your Honor would like to hear it prior to ruling on it.

THE COURT: We're going to have to play it in the absence of the jury in order for us to --

MR. GRACE: If it please the Court, my objection is going to whether or not the man could freely and voluntarily, assuming therefore he understood it, whether or not he knew what he was doing at the time he said all these things to Sergeant Morse.

THE COURT: Isn't that a question for the jury?

MR. GRACE: No, sir. No that's a question for the Judge, whether he made it freely and voluntarily. Therefore, I would like to call witnesses to show that he wasn't --.

THE COURT: You can call those witnesses. I think it's primarily a question for the jury under proper instructions of

> the Court. I think prima facie that the State had laid the proper predicate as far as voluntariness is concerned. The ultimate question is for the jury to decide. I think that it is a question for the Court to determine if it's prima faciely [sic] made and then it becomes a question for the jury. And I rule that it has been made.

The tape of Miller's statement was played to the jury. Miller also testified on his own behalf. He stated that he had called a cab to the Mermaid Club on Fort Myers Beach, had entered the cab, and had changed cabs with the driver. Then, he testified, "Well, we rode for a while and I saw the yellow in my mother and I started screaming and I pulled out the knife." Todd stopped the cab, and according to Miller, "I'm pretty sure this body stabbed her. The only thing I can recollect in the thing, I wouldn't say. I would say she was stabbed four times and not nine times [as prosecution witnesses had

testified] . . . . I was stabbing my mother. I don't even know what Alexandra Todd looks like."

Two psychiatrists testified for the defense. Dr. Clarence Schilt testified that, in his opinion, Miller was schizophrenic and insane at the time of the offense. Dr. Schilt stated that Miller suffered auditory and visual halucinations during his examination. Dr. Schilt also explained that he based his diagnosis of schizophrenia largely on the flat effect of Miller's speech during examination. The prosecution stressed this point during closing argument because, according to the prosecutor, the tape of Miller's statement to the police did not demonstrate that Miller's voice had a flat effect but supported the conclusion that Miller was a logical thinking person at the time of the murder.

The jury deliberated for three hours, found Miller guilty of first degree murder, and recommended the death sentence. The Florida Supreme Court vacated the death sentence on direct appeal. **Miller v. State.** 332 So.2d 65 (Fla. 1976). The trial court resentenced Miller to death, and the Florida Supreme Court again vacated the sentence. **Miller v. State,** 373 So.2d 882 (Fla. 1979). Subsequently the trial court sentenced Miller to life imprisonment without possibility of parole. Miller filed this petition for habeas corpus **pro se** on September 7, 1983.[5]

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[5] On direct appeal, Miller presented to the Florida Supreme Court the argument that his statement was admitted improperly. Apparently Miller did not seek post-conviction remedies in the Florida state courts. We do not speculate whether the claim presented in this appeal can be raised in Florida's post-conviction proceedings. The state of Florida has not raised the defense of exhaustion of state remedies and the exhaustion requirement is not jurisdictional. **See Granberry v. Greer,** ___ U.S. ___, 107 S.Ct. 1671, 1673, 95 L.Ed.2d 119 (1987).

Ground One of his petition alleged that his taped "[c]onfession was allowed before the jury without a determination of voluntariness by the court." Ground Two alleged that "Miller's confession was involuntary and taken in violation of his **Miranda** rights." In the supporting facts for Ground Two, Miller asserted that "the confession was invalid due to Miller's psychiatric condition at the time he was arrested. The defendant was unable to make an intelligent waiver of his right to remain silent."

The magistrate's report and recommendation concluded that the state trial court violated **Jackson v. Denno**, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and **Sims v. Georgia**, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967), by allowing Miller's statements to go to the jury without previously making an independent determination of the voluntariness of the statements.

However, the magistrate concluded that the introduction of the statements in violation of **Jackson v. Denno** was harmless error beyond a reasonable doubt on the issue of Miller's factual guilt, because the statements were merely cumulative of much stronger evidence already in the hands of the state, such as Miller's fingerprints inside the car and eye-witness testimony that Miller had entered te cab. The magistrate also concluded that even though the tape of Miller's statement was relevant on the issue of Miller's sanity because the tape did not show a flat effect on Miller's voice, **Jackson v. Denno**, did not require the trial court to hold "a hearing before a defendant's statement can be admitted in evidence on [the issue of sanity] at least where, as here, there is no allegation of any improper police conduct in eliciting the statements." Accordingly, the magistrate recommended that Miller's petition be dismissed

and the trial court adopted the magistrate's report. This appeal followed:

II.

The parties agree that the central issue on appeal is the admissibility of the tape recording of the statements that Miller gave to Schmirler and Morse on the night of Alexandra Todd's murder. Miller's defense attorney objected to the introduction of the taped statements as involuntary and as taken in violation of **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Miller argues that he is entitled to habeas corpus relief because the trial court failed to make an independent determination of the statement's voluntariness. Resolving this issue requires us to consider the complex relationship among some of the most important cases on constitutional criminal procedure.

The **Miranda** rules governing advice of rights to persons subject to custodial

interrogation have their origins, of course, in the values of the fifth and fourteenth amendments that they were designed to protect.[6] It is now clear, however, that the requirements of **Miranda's** prophylactic rules[7] can diverge significantly from the force of the prohibition in the due process clause itself against the introduction of involuntary statements. For example, **Miranda** and the due process clause affect differently

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[6] **See Miranda v. Arizona**, 384 U.S. at 460 - 66, 86 S.Ct. at 1620 - 23.

[7] **See generally Moran v. Burbine**, 475 U.S. 412, 106 S.Ct. 1135, 1143, 89 L.Ed.2d 410 (1986); **New York v. Quarles**, 467 U.S. 649, 654, 104 S.Ct. 2626, 2630, 81 L.Ed.2d 550 (1984); **Michigan v. Tucker**, 417 U.S. 433, 444, 94 S.Ct. 2357, 2364, 41 L.Ed.2d 182 (1974).

the collateral uses of statements at trial,[8] the "fruit of the poisonous tree" doctrine,[9] and the harmless error calculus.[10]

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[8] **Compare Harris v. New York,** 401 U.S. 222, 224, 91 S.Ct. 643, 645, 28 L.Ed.2d 1 (1971) (statements taken in violation of **Miranda** admissible to impeach defendant's testimony at trial) **with Mincey v. Arizona,** 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290 (1978) (any criminal trial use of truly involuntary statements impermissible).

[9] **Compare Clewis v. Texas,** 386 U.S. 707, 710, 87 S.Ct. 1338, 1340, 18 L.Ed.2d 423 (1967) (third confession suppressed as fruit of earlier involuntary confessions) **with Oregon v. Elstad,** 470 U.S. 298 303 - 09, 105 S.Ct. 1285, 1292 - 93, 84 L.Ed.2d 222 (1985) (rejecting "cat out of the bag" theory requiring suppression of confession as fruit of earlier voluntary confession taken in violation of **Miranda**).

[10] **Compare Cape v. Francis,** 714 F.2d 1287, 1294 (11th Cir. 1984) (admission of statement taken in violation of **Miranda** can be harmless error). **cert. denied,** 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 245 (1985) **with Mincey v. Arizona,** 437 U.S. at 398, 98 S.Ct. at 24166 (admission of truly involuntary statement requires reversal, even if there is other evidence to support conviction).

The prohibition against the introduction of involuntary statements long predates **Miranda**[11] and **Miranda** was not the first case in which the Supreme Court imposed rules on state courts to protect against the use of involuntary confessions. In **Jackson v. Denno**, 378 U.S 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the Supreme Court held that, when a defendant objects to the introduction of his statement as involuntary, due process requires a trial judge to make an independent determination that the statement is voluntary before permitting it to be heard by the jury. The **Jackson v. Denno** Court struck down a New York rule that permitted the trial judge to exclude a confession only if "in no circumstances could the confession be deemed voluntary." 378 U.S. at 377, 84 S.Ct. at

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11 **See Brown v. Mississippi**, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936).

1781. In **Sims v. Georgia,** 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967), the Supreme Court disapproved a Georgia practice similar to the one employed by the Florida judge at Miller's trial, which allowed the introduction of a statement if the state effectively made a **prima facie** showing that the statement had been given voluntarily. **Sims,** 385 U.S. at 542, 87 S.Ct. at 642.

[1, 2] Due process thus requires not only that a conviction not be based on an involuntary confession, but also that a trial court hold what has become known as a **Jackson-Denno** hearing when a defendant contests the voluntariness of his statement. The usual remedy for a state court's failure to hold a **Jackson-Denno** hearing is not automatic reversal or grant of the writ of habeas corpus but rather a remand to the state trial court for a reliable evidentiary hearing on the limited issue of the

confession's voluntariness. **Jackson v. Denno**, 378 U.S. at 393 - 94, 84 S.Ct. at 1789 - 90. For a habeas petitioner to be entitled to this relief, however, he must allege some facts that would indicate the involuntariness of his confession. As a panel of this court recently explained, facts that do not indicate that a confession could be involuntary a **fortiori** do not entitle a defendant to a hearing on that issue. **See United States v. Scheigert,** 809 F.2d 1532, 1533 (11th Cir. 1987) (per curiam).

The Supreme Court recently explored the meaning of voluntariness in the confession context in **Colorado v. Connelly,** ___ U.S. __, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Connelly approached a police officer on a Denver street to confess to a murder. The police officer advised Connelly of his **Miranda** rights, which Connelly stated that he understood. At the police station, Connelly gave

a detailed description of the murder and took two officers to the location of a crime. The next day, however, Connelly became disoriented and stated for the first time that "voices" had told him to come to Denver to confess to a murder. A psychiatrist examining Connelly concluded that Connelly, in flying from Boston to Denver and confessing to a murder, was following what he believed to be the voice of God. The psychiatrist testified that, in his expert opinion, Connelly's confession was not voluntary because Connelly was suffering from "command hallucinations" that interfered with his "volitional abilities; that is, his ability to make free and rational choices." 107 S.Ct. at 519.

The Colorado trial court suppressed Connelly's statements to the police as involuntary, and the Colorado Supreme Court affirmed. The United States Supreme Court held,

however, that the fifth and fourteenth amendments did not require the suppression of Connelly's statements as involuntary. The Supreme Court reasoned that nothing in the record of Connelley's case gave any indication that the confesstion was overreaching. **Id.** at 520. Without some showing of police overreaching, the due process clause did not require the exclusion of Connelly's confession, because "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." **Id.** The **motive** that impels a defendant to confess to the police, other than a motive to end police coercion, is not an issue to which the United States Constitution speaks; "coercive police activity is a necessary predicate to the finding that a confession is not voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment." **Id.** at 522.

[3] Given this explicit holding by the Supreme Court, we conclude that the record does not demonstrate facts that would have entitled Miller to a **Jackson-Denno** hearing on the issue of voluntariness. The record does not reveal any evidence of police overreaching that would rise to a violation of due process itself. This does not mean that the mental illness of a defendant is irrelevant to voluntariness. The Supreme Court noted in **Connelly** that "as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." **Id.** at 520. Voluntariness is determined by an assessment of the totality of the circumstances, but that assessment must include an element of official overreaching to warrant a conclusion that a confession is involuntary under constitutional law. **Id.**

In this case, however, there was no official overreaching that could have rendered Miller's statement involuntary. Although Miller told Schmirler and Morse, "Well, I've been -- I'm very mentally disturbed," **Connelly** makes clear that even the interrrogators' knowledge that a suspect may have mental problems does not make the suspect's statement involuntary unless "[t]he police exploited this weakness **with coercive tactics.**" **Id.** at 521 (emphasis added). The **Connelly** Court's discussion of **Blackburn v. Alabama,** 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960), compels this conclusion. In **Blackburn,** the police learned during the interrogation that Blackburn had a history of mental problems. What violated due process, however, was "the eight to nine-hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers; the absence of Blackburn's

friends, relatives, or legal counsel; [and] the composition of the confession by the Deputy Sheriff rather than by Blackburn.'" **Blackburn,** 361 U.S. at 207 - 08, 80 S.Ct. at 280, **quoted in Connelly,** 107 S.Ct. at 521.

The conduct of Schmirler and Morse in this case does not resemble the conduct of the police in **Blackburn** or any of the involuntary confession cases additionally cited by the **Connelly** Court. **See** 107 S.Ct. at 520 n. 1. The transcript of Miller's statement shows that the police did not subject Miller to interrogation of exhaustingly long duration. The transcript does not suggest, nor does Miller allege, that the police either applied physical force or threatened to do so. Nor is there any suggestion that the police made any promises of reward to induce Miller's statement. **Cf. Martin v. Wainwright,** 770 F.2d 918, 925 (11th Cir. 1985), **modified,** 781 F.2d 185 (11th Cir.), **cert.**

**denied,** ___ U.S. ___, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986).

[4] Schmirler and Morse did, arguably, violate the rule of **Edwards v. Arizona,** 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), requiring the cessation of police interrogation once a suspect has indicated a wish to speak to an attorney That rule by itself can afford Miller no relief because it is not to be applied retroactively to the date of Miller's trial. **Solem v. Stumes,** 465 U.S. 638, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). A violation of the Edwards rule, moreover, is not necessarily coercive police conduct. The police actions in this case resemble those in **Frazier v. Cupp,** 394 U.S.

731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969).[12] Frazier began to "spill out" his story after the police "suggested" that his victim had started the fight. **Id.** at 738, 89 S.Ct. at 1424. After Frazier became reluctant to continue his statement and said, "I think I had better get a lawyer before I talk any more," the interrogator replied, "You can't be in any more trouble than you are in now," and continued the questioning. **Id.** The Supreme Court unanimously concluded that Frazier's confession was voluntary.

Accordingly, we conclude that, on the facts presented, Miller is unable to establish that his statements to Schmirler and

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12 Frazier's trial took place before the **Miranda** decision. Because the Supreme Court held in **Johnson v. New Jersey**, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), that **Miranda** was inapplicable to trials conducted before the date of that decision, the admissibility of Frazier's statement depended on its voluntary quality and not on adherence of the police to the **Miranda** rules.

Morse were involuntary.

B.

As noted above, however, **Miranda** and the due process clause affected the admissiblity of a defendant's statements differently. Due process requires only that a defendant's statements be uncoerced; the **Miranda** rules condition the admissibility of an uncounselled statement taken during police interrogation on the state's demonstrating "that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appoint counsel." **Miranda**, 384 U.S. at 475, 86 S.Ct. at 1628. The standard used to assess the validity of a defendant's waiver of his **Miranda** rights is the familiar test of **Johnson v. Zerbst**, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 (1938), applied to the waiver of constitutional rights: "A waiver is ordinarily an intentional relinquishment or

abandonment of a known right of privilege. The determination of whether there has been an intelligent waiver . . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." **See Edwards v. Arizona**, 451 U.S. 477, 482, 101 S.Ct. 1880, 1884, 68 l.Ed.2d 378 (1981);[13] **Miranda**, 384 U.S. at 475; 86

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13 In **Edwards**, the Supreme Court held that "an accused . . . having expressed his desire to deal with the police only through counsel is not to be subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police." 451 US. at 484 - 85, 101 S.Ct. at 1884 - 85. In **Solem v. Stumes**, 465 U.S. 638, 646, 104 S.Ct. 1338, 1343, 79 L.Ed.2d 579 (1984), the Supreme Court made clear that, as regards the right to deal with the police only through counsel, **Edwards** had replaced the flexible test of determining whether a defendant had waived his rights established in **Johnson v. Zerbst** with a new "bright line" test. **Stumes** also makes clear, however, that Miller does not have the benefit of this "bright line" test, because that case held the new test of **Edwards** nonretroactive to convictions, such as Miller's that were

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S.Ct. at 1628; **Johnson**, 304 U.S. at 468, 58 S.Ct. at 1024 (sixth amendment bars defendant's conviction if accused is not represented by counsel "and has not competently and intelligently waived his constitutional right").

Certainly the waiver of **Miranda** rights must also be voluntary to be effective against a defendant, and the Supreme Court in **Connelly** explained that "voluntariness" in the context of a **Miranda** waiver means the same thing as "voluntariness" in the due process context, i.e., freedom from official coercion. **Connelly**, 107 S.Ct. at 523. The Supreme Court has stated explicitly, however, that a valid waiver of **Miranda** rights must not only be voluntary; it must also be **intelligently** made. In **Edwards v. Arizona**, the Supreme Court overturned Edwards' conviction

even though the trial court had found Edwards' admission to have been voluntary. The trial court had erred because it had not separately focused on whether Edwards "had knowingly and intelligently relinquished his right to counsel." **Edwards**, 451 U.S. at 483, 101 S.Ct. at 1884. The Supreme Court also disapproved the standard employed by the Arizona Supreme Court in reviewing the validity of Edwards' waiver of his **Miranda** rights. The Arizona Supreme Court had applied the test of **Schneckloth v. Bustamonte**, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973), which governs the validity of a consensual search under the fourth amendment. As the United States Supreme Court explained:

> The issue in **Schneckloth** was under what conditions an individual could be found to have consented to a search and thereby waived his Fourth Amendment rights. The Court declined to impose the

> "intentional relinquishment or abandonment of a known right of privilege" standard and required only that the consent be voluntary under the totality of the circumstances. The Court specifically noted that the right to counsel was a prime example of those rights requiring the special protection of the knowing and intelligent waiver standard, but held that "[t]he considerations that informed the Court's holding in **Miranda** are simply inapplicable in the present case." **Schneckloth** itself thus emphasized the voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries. Here, however sound the conclusion of the state courts as to the voluntariness of Edwards' admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it.

**Edwards**, 451 U.S. at 483 - 84, 101 S.Ct. at 1884 (citations omitted). The Supreme Court

could not have stated more clearly that an uncounselled statement must be both voluntary and made after a knowing and intelligent waiver of the **Miranda** rights to be admissible. Furthermore, in **Tague v. Louisiana,** 444 U.S. 469, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980)(per curiam), the Supreme Court summarily reversed a decision by the Louisiana Supreme Court that Tague's confession was admissible even though the prosecution had introduced no evidence that Tague had knowingly waived his rights. "[N]o evidence at all was introduced to prove that the petitioner knowingly and intelligently waived his rights before making the inculpatory statement. The statement was therefore inadmissible." **Tauge,** 444 US. at 471, 100 S.Ct. at 653.

We do not read the **Connelly** decision as demonstrating an intent by the Supreme Court to eliminate this distinction between voluntariness and knowing waivers. As the Court

explained, Connelly appeared to know what he was doing at the time of his confession and appeared to understand the nature of his **Miranda** rights. Dr. Metzner testified at Connelly's trial that Connelly's illness did not significantly impair Connelly's cognitive abilities. Connelly's will, not his intellect, was overborne by the voices that he heard. **See Connelly,** 107 S.Ct. at 518 - 19. The question of whether Connelly had **intelligently** waived his **Miranda** rights was not presented to the Supreme Court. We cannot therefore conclude, as the state essentially argues, that **Connelly** overruled **Edwards v. Arizona.**

Finally, the **Connelly** Court noted that "[o]f course, a waiver must **at a minimum** be 'voluntary' to be effective against an accused." 107 S.Ct. at 523 (emphasis added). The Court's use of the term "at a minimum" suggests that a waiver must meet at

least one other standard as well to be effective against an accused. The **Connelly** Court's opinion at that point cites to **North Carolina v. Butler,** 441 US. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979). On that page, the **Butler** Court wrote, 'The question is not one of form, but rather whether the defendant in fact **knowingly and voluntarily** waived the rights delineated in the **Miranda** case" (emphasis added). **See also Moran v. Burbine,** 475 U.S. 412, 106 S.Ct. 1135, 1142, 89 L.Ed.2d 410 (1986) ("[T]he state of mind of the police is irrelevant to the question of the **intelligence** and voluntariness of respondent's election to abandon his rights . . . . [S]uch conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them") (emphasis added);

**Lindsey v. Smith**, 820 F.2d 1137, 1149 (11th Cir. 1987); **Agee v. White**, 809 F.2d 1487, 1493 (11th Cir. 19870; **Wilson v. Murray**, 806 F.2d 1232, 1235 (4th Cir. 1986), **cert. denied**, ___ U.S. ___, 108 S.Ct. 197, 98 L.Ed.2d 149 (1987).

[5] There is little doubt that mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver of his **Miranda** rights. Competency to make such a waiver is, of course, to be determined according to the totality of the circumstances. **Johnson v. Zerbst**, 301 U.S. at 464, 58 S.Ct. at 1023. This is not a field for inflexible rules. **See North Carolina v. Butler**, 441 U.S. at 375, 99 S.Ct. at 1758. Nonetheless, mental illness is certainly a factor that a trial court should consider when deciding on the validity of a waiver. If a defendant cannot understand the nature of his rights, he cannot waive them

intelligently. Thus, the Supreme Court has recognized that a juvenile defendant may be too young and inexperienced to make an intelligent waiver. **See Fare v. Michael C.,** 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979). The Former Fifth Circuit held that mental retardation can render a defendant incapable of intelligently waiving the **Miranda** rights. **Cooper v. Griffin,** 455 F.2d 1142, 1145 (5th Cir. 1972).[14] The Fourth Circuit has held that youthfulness and schizophrenia can combine to invalidate a waiver of rights, **Moore v. Ballone,** 658 F.2d 218, 229 (4th Cir. 1981), and the Sixth Circuit has held that language difficulties can render a defendant's waiver of **Miranda** rights invalid. **See United States v. Short,** 790 F.2d 464, 469 (6th Cir. 1986).

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[14] The Eleventh Circuit, in the en banc decision **Bonner v. City of Prichard,** 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

In the instant case, the trial court, without giving Miller's counsel the opportunity to argue that Miller's **Miranda** waiver was invalid, apparently assumed that voluntariness and waiver constituted the same issue, and that the state was entitled to introduce Miller's statements into evidence if the facts demonstrated a **prima facie** showing that Miller's confession was voluntary. The trial court made the mistake committed by the Arizona trial judge in **Edwards v. Arizona** of confusing voluntariness and waiver. Accordingly, we conclude that the trial court erred by admitting Miller's statement without first deciding that Miller had made a valid waiver of his **Miranda** rights.

III.

[6] Our determination that the trial court erred in admitting the recording of

Miller's statements does not end our inquiry, however, because the district court concluded that the admission of the tape was harmless error. It is settled that the admission of uncoerced statements obtained in violation of **Miranda** can be harmless error. **Christopher v. Florida,** 824 F.2d 836, 846 n. 23 (11th Cir. 1987); **Cape v. Francis,** 741 F.2d 1287, 1294 (11th Cir. 1984), **cert. denied,** 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 245 (1985). "If, upon its reading of the trial record, the appellate court is firmly convinced that the evidence of guilt was so overwhelming that the trier of fact would have reached the same result without the tainted evidence, then there is insufficient prejudice to mandate the invalidation of the conviction." **Cape,** 741 F.2d at 1294 - 95.

A.

We conclude, without too much difficulty, that the admission of the recording was

harmless error as to Miller's **factual guilt.** First, it is significant that Miller's statement to Schmirler and Morse did not really constitute a confession. Rather, Miller told the interrogators that he took a taxi to Fort Myers Beach, called a taxi back to Fort Myers, entered the cab, and changed cabs. He also told the police that he walked into the parking lot of Gibson's department store, asked a young man to buy a T-shirt for him, and hitchhiked into downtown Fort Myers. He did not tell Schmirler and Morse that he stabbed Alexandra Todd. He claimed that he could not remember what happened after he changed taxis.

In short, Miller's statement told the jury only what the police already knew or what other witnesses would relate. Margaret Sessions testified that she drove Miller to Fort Myers Beach. Stancil Ollis testified that he sold Miller a knife with a six-inch

blade, which could have made the deep stab wounds found in Alexandra Todd's body. Darrel Coleman witnessed Miller's purchase of the knife,[15] get into a taxi driven by a woman, and change taxis with the driver. Indeed, the police already knew these facts when they arrested Miller, because Coleman had alerted the sheriff's department. Finally, Joe Roberts testified that they met Miller in the parking lot of Gibson's, that he bought T-shirts for Miller, and that he gave Miller a lift into downtown Fort Myers.

Furthermore, the police had one piece of evidence that clinched the issue as to Miller's factual guilt: They found Miller's palmprint on the steering wheel of Alexandra

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[15] Miller told Schmirler and Morse that he did not remember purchasing a knife. The testimony of Ollis and Coleman thus made the state's position stronger than it would have been had the state relied only on Miller's statement.

Todd's taxicab. This evidence was crucial, because it established that Miller had, at some point, moved into the driver's seat in the front of the taxi. Miller told the police, however, that he remembered only getting into the back seat, and Darrell Coleman's eyewitness testimony corroborated that Miller got into the back seat of the taxi. In the ordinary course of events, taxi passengers do not move into the dirver's seat of the taxi. Miller's palmprint was strong evidence either that Miller at some point drove the taxi -- which would have made the jury suspicious about what had happened to Alexandra Todd -- or that he reached into the front seat to attack Todd.

We are not convinced, therefore, by Miller's argument that he was forced to take the stand, admit his guilt, and rely on the insanity defense as result of the introduction of the tape. Miller was not forced to

take the stand to rebut the taped statements, for the tape did not establish Miller's factual guilt; Miller told Schmirler and Morse that he could not remember what happened after he and Alexandra Todd changed taxis. Although Miller is correct that the state had solely circumstantial evidence as to Miller's guilt without the tape, the tape did not change matters. The statements that Miller gave to the interrogators neither admitted the murder nor placed him at the scene of the crime. Moreover, the circumstantial evidence against Miller, even without the tape, was strong: eyewitness testimony and a palmprint. If any evidence made it advisable for Miller to rely on the insanity defense, it was the palmprint, for Miller had to supply some explanation for his getting into the driver's seat of the taxicab.

B.

We confront a much more difficult issue

in determining whether the introduction of the tape was harmless error on the issue of Miller's insanity defense. The issue is difficult because the state's uses of Miller's statements straddle the border between testimonial and non-testimonial uses within the meaning of the fifth amendment.

Essentially, the state made two uses of the tape. First, it used the recording to demonstrate to the jury that Miller's voice did not have a flat effect. The **sound** of Miller's voice on the tape tended to rebut the testimony of one of Miller's psychiatric experts, Dr. Clarence Schilt, who testified that Miller was, in his opinion, schizophrenic. Dr. Schilt acknowledges that he based this diagnosis of schizophrenia solely on the flat effect of Miller's voice during his examination.

If this were the sole use that the state had made of the tape, we might conclude that

the admission of the tape was harmless error.[16] The fifth amendment does not prohibit the state from introducing real evidence as to the physical properties of a defendant's voice. Such evidence is not communicative or testimonial evidence within the meaning of the fifth amendment, **United States v. Dionisio**, 410 U.S. 1, 5 - 7, 93 S.Ct. 764, 767 - 68, 35 L.Ed.2d 67 (1973), just as a blood sample is not cummunicative evidence, **Schmerber v. California**, 384 U.S. 757, 764 -

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16 We do not so hold, however. Obviously, it would have been preferable if the state had introduced a more neutral voice exemplar rather than the tape of the actual statement that Miller gave to the police. In this case, however, Miller would not have been prejudiced by the introduction of the tape because the tape did not contain a confession. We would face a very different issue if the state attempted to introduce a taped uncounselled confession taken in violation of **Miranda**, purportedly on the issue of insanity alone. We do not mean to imply approval of any such scheme. In any case, the admission of such a recording might constitute prejudice on the issue of the defendant's factual guilt.

75, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908 (1966), and the body itself is not testimony, **see United States v. Wade**, 388 U.S. 218, 222, 87 S.Ct. 1926, 1929, 18 L.Ed.2d 1149 (1967). Nor is the use of such physical properties of the body limited to identification purposes, as was permitted by the Court in **Dionisio**, 410 U.S. at 5 - 7, 93 S.Ct. at 767 - 68 (approving use of voice exemplars for identification). In **Schmerber**, the Supreme Court approved the use of blood samples for blood alcohol tests, which are conducted not for the purpose of identification but rather to determine whether the blood has certain properties.

A different problem is presented, however, by the state's use of the **contents** of Miller's taped statements to cross-examine Dr. Schilt on his diagnosis of schizophrenia and to elicit the opinion of the state's expert witness, Dr. Mordecal Haber. On

cross-examination of Dr. Schilt, the prosecutor formulated a long hypothetical question which referred to actual occurrences on the day of Alexandra Todd's murder as well as to the chronology of events and explanation of Miller's movements given by Miller to Schmirler and Morse. The prosecutor pointed out several inconsistencies between the actual events and Miller's version of the events (including Miller's claimed inability to remember that he had purchased a fishing knife and to remember what had happened after he changed taxis) and asked Dr. Schilt:

> Would it not be strange, if in his narration as I described for you, the interview he gave, the tape, for our hypothetical man to say to the law enforcement officers, if his description is consistent as to what occurred that day fits with what other witnesses said happened, then if it gets inconsistent or fails to bring out the factors of the crime and also includes lies which would go to hide the

> crime, **would that not show a plan to deceive rather than an inconsistent and fragmented mind?**
>
> A. I would say this is so, yes, sir.

Later the prosecutor similarly formulated a long hypothetical for Dr. Haber, including Miller's purported inability to remember purchasing the knife, taking the taxi ride, or discarding his bloody shirt. At the end of the hypothetical, Dr. Haber testified:

> My own feeling, from what you gave me in your hypothetical question, he overwrites the script, he crowds the canvas too much . . . [M]y conclusion is that the man has no regard for the laws of society, has followed his own needs and his own pleasures . . . It is consistent with the diagnosis of a sociopathic, an antisocial character.
>
> **There is no difficulty in terms of this man's mentality. As a matter of fact, he sounds rather inventive, sounds like he**

**has a creative mind. He would know right from wrong.**

The record thus demonstrates that the state relied on the content of Miller's statements to establish Miller's sanity. The admission of Miller's statements had a clearly testimonial aspect with fifth amendment implications. This situation is governed by **Cape v. Francis,** 741 F.2d 1287 (11th Cir. 1984), **cert. denied,** 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 245 (1985). In **Cape,** the defendant's fifth amendment rights were violated when psychiatrist gave his opinion at trial that Cape was sane at the time of the offense, based upon his examination of Cape without administering any **Miranda** warnings. The psychiatrist based his diagnosis not just on Cape's demeanor and the sound of Cape's voice, but on the contents and substance of Cape's answers to his questions, "thus making Cape's communications to him testimonial in nature." 741 F.2d at 1294 & n. 7.

We recognize that the state may compel a defendant to undergo a psychiatric examination and introduce the testimony of the examining psychiatrist when the defendant raises the issue of sanity at trial. **United States v. Cohen,** 530 F.2d 43, 47 - 48 (5th Cir.), **cert. denied,** 429 US. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976). Moreover, if the defendant relies on "extreme emotional disturbance" (and, presumably, insanity) the prosecution may have read to the jury a **written** report of a psychological evaluation made under custodial circumstances but without **Miranda** warnings. **Buchanan v. Kentucky,** ___ U.S. ___, 107 S.Ct. 2906, 2917 - 18, 97 L.Ed.2d 336 (1987). There is a great difference, however, between asking a psychiatrist to examine a defendant and eliciting his opinion testimony on the stand, and playing a tape of the defendant's uncounselled statement to the police and asking a testifying

expert to render an opinion based on the tape and on a hypothetical question. Not only is the latter method much less probative of the defendant's sanity,[17] it is much more prejudicial to the defendant. Indeed, in this circuit, even though the prosecution may compel a psychiatric examination of a defendant and may elicit the psychiatrist's opinion testimony based on the examination, any statement that the defendant made to the psychiatrist about the offense itself during the examination can be suppressed. **See United States v. Cohen,** 530 F.2d at 47 & n. 13. If a defendant is prejudiced by a psychiatrist's **reporting** of an uncounselled communicative remark, he is a **fortiori** prejudiced by the playing of a tape of such a statement.

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17 **See United States v. Cohen,** 530 F.2d at 48 & n. 14 (citing with approval view that lengthy personal interview is the only effective means of assertaining sanity).

The rationale for permitting the prosecution to conduct compelled psychiatric examinations of defendants is not that such examinations raise no fifth amendment concerns; they do, because the examination may reveal information testimonial or communicative in nature. The government must, however, have some opportunity for access to defendants, or defendants would be able to raise the insanity defense and produce their own mental health experts with impunity. **See Estelle v. Smith**, 451 U.S. 454, 465, 101 S.Ct. 1866, 1874, 68 L.Ed.2d 359 (1981). For that very reason, however, the prosecution does not need to play to the jury a tape of a statement taken in violation of **Miranda** and unwitnessed by a qualified expert. The prosecution can readily produce more accurate evidence on the issue of the defendant's sanity namely the testimony (or the report) of a qualified examining psychiatrist.

Here the state relied heavily on the tape of Miller's statement to elicit the opinions of Doctors Schilt and Haber that Miller could have been a liar, not a schizophrenic. There was certainly a reasonable possibility that, absent the introduction of the tape, Miller's jury would have found him insane at the time of the crime. Accordingly, we conclude that the introduction of Miller's statement was not harmless error on the issue of insanity.

IV.

[7, 8] We turn finally to the question of relief. Under the principles announced by the Supreme Court in **Jackson v. Denno,** 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the proper remedy for the failure of a state trial court to afford a defendant a hearing on the voluntariness of a confession is for the state court -- to conduct an evidentiary hearing on the voluntariness

issue. **See Jackson v. Denno,** 378 U.S. at 393 - 94, 84 S.Ct. at 1790.[18] As we have explained, however, the failure of the state trial court in this case was not in refusing Miller a **Jackson-Denno** hearing, to which he was not entitled, but in admitting Miller's statement without determining that the statement had been given after a knowing and intelligent waiver of the **Miranda** rights. We are not certain, therefore that the remedial procedures established by **Jackson v. Denno,** control this case. The Supreme Court decided **Jackson v. Denno** before it decided **Miranda,** and neither the Supreme Court nor this court has considered whether the **Jackson-Denno** procedures apply to cases such as this one.

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[18] When a habeas petitioner seeks the writ on the ground of failure to conduct a **Jackson-Denno** hearing, the district court must "allow the State a reasonable time to afford [the petitioner] **a hearing or a new trial,** failing which [the petitioner] is entitled to his release." **Jackson v. Denno,** 378 U.S. at 396, 84 S.Ct. 1796 (emphasis added).

Indeed, if one considers Miller's inability to make an intelligent waiver of the **Miranda** rights as an issue of competency, then the proper remedial procedures may be akin to those set forth in **Pate v. Robinson,** 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), and **Lee v. Alabama,** 386 F.2d 97 (5th Cir. 1967) (en banc), **cert. denied,**395 U.S. 927, 89 S.Ct. 1787, 23 L.Ed.2d 246 (1969). Both **Robinson** and **Lee** involved habeas petitioner challenging state convictions for failure of the state trial court to hold a hearing on the defendant's competency to stand trial. In **Robinson,** the Supreme Court rejected the state's suggestion that a limited, **Jackson-Denno**-type hearing could be held by either the state or federal court to determine retrospectively the defendant's competency to stand trial. The Court stated that "we have previously emphasized the difficulty of retrospectively determining an

accused's competency to stand trial." **Pate v. Robinson,** 383 U.S. at 387, 86 S.Ct. at 843; **see also Drope v. Missouri,** 420 U.S. 162, 183, 95 S.Ct. 896, 909, 43 L.Ed.2d 103 (1975) (reaffirming this aspect of **Robinson**).

The Former Fifth Circuit interpreted **Pate v. Robinson** as disapproving retrospective determinations of competency to stand trial but not as establishing a flat prohibition against them. In **Lee v. Alabama,** 386 F.2d at 108, the Fifth Circuit held that, if a habeas petitioner establishes that he was entitled to a hearing on the issue of his competency to stand trial at the time of the trial, the district court must then consider, first, whether it can hold a meaningful evidentiary hearing into the petitioner's

competency **nunc pro tunc.**[19] If the district court concludes that it can hold a meaningful hearing into the petitioner's competency, it may do so. If, on the other hand, the district court concludes that it cannot hold such a retrospective hearing, it must grant

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[19] Other circuits that have considered an analogous issue, the competency of a defendant to plead guilty and thus waive the right to a jury trial, have divided as to when and under what circumstances a **nunc pro tunc** determination of competency can be made. The courts apparently agree, however, that retrospective determination of competency are undesirable but not **per se** impermissible. **Compare United States v. Cole,** 813 F.2d 43 (3d Cir. 1987) (prisoner must be given new trial or be allowed to plead anew, as competency to plead guilty could not be determined retrospectively) **with United States v. Hollis,** 569 F.2d 199 (3d Cir. 1977) (retrospective determination of competency can be made) **and DeKaplany v. Enomoto,** 540 F.2d 975, 985 -86 & n. 11 (9th Cir. 1976) (en banc) (district court's retrospective determination of defendant's competency to plead guilty did not violate due process), **cert. denied,** 429 U.S. 1075, 97 S.Ct. 815, 50 L.Ed.2d 793 (1977) **and Saddler v. United States,** 531 F.2d 83, 87 (2d Cir. 1976) (retrospective determination of competency to plead guilty disfavored but permissible).

the writ of habeas corpus unless the state retries the petitioner. **See Lee,** 386 F.2d at 108; **see also Lokos v. Capps,** 625 F.2d 1258, 1262 (5th Cir. 1980); **Bolius v. Wainwright,** 597 F.2d 986, 988 (5th Cir. 1979); **United States v. Makris,** 535 F.2d 899, 904 (5th Cir. 1976), **cert. denied,** 430 US. 954, 97 S.Ct. 1598, 51 L.Ed.2d 803 (1977); **Carroll v. Beto,** 421 F.2d 1065, 1068 (5th Cir. 1970).

The determination of whether a district court can hold a meaningful retrospective competency hearing is necessarily a case-by-case one. We have never given the district courts a list of factors that must be met to decide that a **nunc pro tunc** determination of competency is possible. Certainly the passage of time is a relevant factor Also relevant are the availability of witnesses and the existence of evidence on the state record about the defendant's mental state at the time. **See United States v. Makris,** 535 F.2d

at 904 - 05; **Martin v. Estelle,** 583 F.2d 1373, 1377 (1978) (Godbold, J., concurring).

We are uncertain as to whether **Jackson v. Denno** or **Pate v. Robinson** governs this case. Both procedures have advantages and disadvantages. **Jackson v. Denno** could well promote judicial economy in cases where the habeas petitioner claims that a confession was both involuntary and given after an unintelligent waiver of **Miranda** warnings. It could be wasteful to require the federal court to decide the **Miranda** issue but to allow the state court to decide the voluntariness issue when both inquiries could involve precisely the same facts. On the other hand, the strong disapproval of retrospective competency determinations announced by the Supreme Court in **Pate v. Robinson** (where the Court specifically rejected the applicability of **Jackson v. Denno** to retrospective competency hearings), reaffirmed by the Supreme

Court in **Drope**, and applied consistently by the Former Fifth Circit and this circuit since **Lee v. Alabama** suggests that **Jackson v. Denno** is inapplicable to claims of invalid waivers of **Miranda** rights.[20]

Because of the novelty of the issue and because the parties did not brief this issue to us, the appropriate procedure appears to be to remand this case to the district court for further proceedings on the issue of relief. The district court should consider and hear arguments on both alternatives suggested above, as well as any other procedures that precedent may require. The parties will be free to argue that case law requires the application of remedial procedures that we

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[20] We note also that none of the courts of appeals that have considered the issue of retrospective determinations of competency to plead guilty has decided the appropriate procedure to be a remand to the state courts for a limited evidentiary hearing on the competency issue.

may have overlooked.

Accordingly, the order of the district court denying the writ of habeas corpus is VACATED, and the case is REMANDED for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-3405

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D.C. Docket No. 83-125

JON S. MILLER,

Petitioner-Appellant,

versus

Cross-Appellee,

RICHARD L. DUGGER,

Respondent-Appellee,

Cross-Appellant.

Appeals from the United States District Court for the Middle District of Florida

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United

States District Court for the Middle District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same are hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court.

Entered: March 10, 1988

For the Court: Miguel J. Cortez, Clerk

By: [s] _____

Deputy Clerk

ISSUED AS MANDATE:

IN THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CRIMINAL ACTION.

STATE OF FLORIDA,

Plaintiff,

vs. Case No. F72-251

JON STEVEN MILLER, a/k/a/
ROBERT CHRISTOPHER,

Defendant.

TRANSCRIPT OF TAPE RECORDING

Admitted into evidence in the trial of the above-styled case, before the Honorable William L. Rose, Circuit Judge, and a Jury, in the Lee County Courthouse, Fort Myers, Florida, February 21, 22 and 23, 1974.

APPEARANCES:

E.G. COUSE, Assistant State Attorney, 20th Judicial Circuit of Florida, Fort Myers, Florida; representing the State of Florida.

A. DOUGLAS GRACE, Attorney at Law, Fort Myers, Florida; representing the Defendant.

MR. MORSE: My name is Sergeant Harry M. Morse, and this is my identification --

MR. CHRISTOPHER: Yes, sir. I talked to you before.

MR. MORSE: -- of the Lee County Sheriff's Office.

MR. CHRISTOPHER: I receive the vibrations, I mean I received the - the general attitude, and I - and I understood that I could remain silent, but I understood your attitude, and I - I decided I'd like to (inaudible)

MR. MORSE: Well, let me introduce you to - this is David Schmirler and he's an Investigator with the State's Attorney's Office. He works for Mr. Joseph P. D'Allessandro. And you, son, are Robert Christopher?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Is that right?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Now, I spoke to you before and I advised you of your rights.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And I'd like to do so again. Before we ask you any questions you must understand your rights.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Now, you have the right to remain silent.

MR. CHRISTOPHER: Uh, huh.

MR. MORSE: Anything you say can be used against you in a court of law.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: You have a right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish. If you decide to answer questions now without a lawyer present, you still have the right to stop

answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. Do you understand each of these rights that I have explained to you --

MR. CHRISTOPHER: Yes, uh, huh.

MR. MORSE: -- I, Sergeant Harry M. Morse. You understand each of these rights?

MR. CHRISTOPHER: Uh, huh.

MR. MORSE: All right, Robert Christopher having these rights in mind, do you wish to talk to us now?

MR. CHRISTOPHER: Yes, I do. Yeah, yeah.

MR. MORSE: All right. Robert Christopher, were you down at Fort Myers Beach earlier in the day?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Today is Tuesday and it's December the 22nd, 1970, and you and I are now at --.

MR. CHRISTOPHER: I don't know what day it is (inaudible)

MR. MORSE: At about 11:44. Excuse me, we're now talking about 10:44 P.M. on Tuesday, December the 22nd, 1970, in the Lee County Jail. Now, you say, sir, you were down at, earlier in the day, at Fort Myers Beach?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Yes, sir. And did you get a taxi while you were down at Fort Myers Beach?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Did you send for a taxi?

MR. CHRISTOPHER: Yes, sir, I had someone to call a taxi.

MR. MORSE: You had someone call you a taxi?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Where were you when the taxi came?

MR. CHRISTOPHER: I don't know, but I asked - I was at a bar, and I asked a barmaid or a bartender to call me a taxi, and they called me a taxi.

MR. MORSE: Did a taxi come, Robert Christopher?

MR. CHRISTOPHER: Yes, sir. Yes, sir. I don't know the name of the barmaid.

MR. MORSE: And do you know the name of the taxi?

MR. CHRISTOPHER: No.

MR. MORSE: What kind of a taxicab driver was it? Was it a male or a female?

MR. CHRISTOPHER: A woman.

MR. MORSE: It was a woman.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: It was a lady taxi driver?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And where did - where did you request a taxi driver to take you?

MR. CHRISTOPHER: I called the taxi - asked someone to call me a taxi. I said I want to go to the bus station cause I want to go to Miami.

MR. MORSE: Uh huh.

MR. CHRISTOPHER: And so I requested them to take me to Miami. but I don't remember ever going to the bus station or anything.

MR. MORSE: You don't ever remember.

MR. CHRISTOPHER: No, sir.

MR. MORSE: But you remember getting into this taxi with a lady driver?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Right.

MR. CHRISTOPHER: We drove a few blocks - no, more than a few blocks. We drove a ways.

MR. MORSE: Uh, huh.

MR. CHRISTOPHER: And I think she stopper [sic] and picked up two - two men.

MR. MORSE: Uh, huh.

MR. CHRISTOPHER: And I don't remember anything other than after that except waking up I was in water.

MR. MORSE: Uh, huh.

MR. CHRISTOPHER: And I didn't have any shirt.

MR. MORSE: What color shirt did you have on when you got into the taxi, Robert?

MR. CHRISTOPHER: When I left here today someone gave me a gold shirt.

MR. MORSE: You was in a gold shirt?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Well - what - had you been in the Lee County Jail? Were you released today?

MR. CHRISTOPHER: I got out today, yeah.

MR. MORSE: I see. And what were you - what were you charged with when you were in here?

MR. CHRISTOPHER: Uh - concealed weapon, a knife.

MR. MORSE: It was a knife?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And you were released today?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: From a charge of carrying a concealed weapon?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: To wit, a knife. And you were down at the beach? I show you these blue dungarees with some blood stains on the back. Are these your trousers?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: All right. And I show you these - these - these shoes - they're brown in color.

MR. CHRISTOPHER: Right.

MR. MORSE: With a rubber sole. Are these your shoes, sir?

MR. CHRISTOPHER: No, they were given to me.

MR. MORSE: They were given to you.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: But did you have them on today?

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: I see.

MR. CHRISTOPHER: All day.

MR. MORSE: And I show you this - this brown shiny plastic material type of belt. Were you wearing this today?

MR. CHRISTOPHER: Yeah, yeah.

MR. MORSE: You were. And I show you this T shirt, sir. And you were brought in here wearing this T shirt with blood on it. Did you have this T shirt on?

MR. CHRISTOPHER: When I woke up I didn't have anything on.

MR. MORSE: I see.

MR. CHRISTOPHER: Except my pants and my shoes.

MR. MORSE: Right.

MR. CHRISTOPHER: And I walked across - as I said, I was in water.

MR. MORSE: Uh,huh.

MR. CHRISTOPHER: And I walked across and I had to cross a fence.

MR. MORSE: Uh,huh.

MR. CHRISTOPHER: And I came out in a - near a parking lot.

MR. MORSE: Uh,huh.

MR. CHRISTOPHER: And there was a shopping mall there. And I asked someone to go buy me a T shirt or something to put on because I didn't have anything on.

MR. MORSE: I see. Was that - was that name --. Do you know the name of the store?

MR. CHRISTOPHER: No, sir.

MR. MORSE: Was it Gibson's?

MR. CHRISTOPHER: I have no idea.

MR. MORSE: But it was in a shopping mall.

MR. CHRISTOPHER: Some sort of shopping mall.

MR. MORSE: Did you have any other T shirts?

MR. CHRISTOPHER: Nothing. I had nothing on.

MR. MORSE: I mean, did you buy any other shirts?

MR. CHRISTOPHER: I gave the fella $5. I reached in my pocket and I found $5. I gave the fella $5. He came out --

MR. MORSE: Uh,huh.

MR. CHRISTOPHER: -- and he said I could only buy three T shirts.

MR. MORSE: Uh,huh.

MR. CHRISTOPHER: And I said that's okay.

MR. MORSE: Right.

MR. CHRISTOPHER: I said here, would you like a dollar? And he said, no, no thank you, that's quite all right.

MR. SCHMIRLER: Where are you from, Robert?

MR. CHRISTOPHER: San Francisco.

MR. MORSE: I - I show you this package. Is it true that you were picked up by the City Police in the Greyhound Bus Station?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And you had this T shirt on with this blood on it. Is that right?

MR. CHRISTOPHER: I had that T shirt on.

MR. MORSE: With this blood on it?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Is that right?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Right. And you had this package. And then I see that this package contains two T shirts and they were purchased

in Gibson's Department Store, which is in a shopping center.

MR. CHRISTOPHER: I don't know anything about a store.

MR. MORSE: Are these the shirts that you - the other two shirts? There were three T shirts altogether?

MR. CHRISTOPHER: I just opened the package. The guy said there were three.

MR. MORSE: Right. And these are the remaining two?

MR. CHRISTOPHER: I guess they must be. I just took one out.

MR. MORSE: I see. I see. Right. All right. Now, how much money did you have with you this morning?

MR. CHRISTOPHER: $25.

MR. MORSE: You had $25? When you came in here, sir, you had a lot of money, in excess of - of $20. I that what you say you had?

MR. CHRISTOPHER: Twenty?

MR. MORSE: Twenty.

MR. CHRISTOPHER: Twenty (inaudible)

MR. MORSE: And you gave this unknown individual $5. That would have left you about $15. Is that right?

MR. CHRISTOPHER: I must have less than that, cause I was drinking in a bar when I called the taxi.

MR. MORSE: So you even had less than that?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Yet when you came in here you had $59 in United States currency in assorted bills in your possession. I show you this money, sir, it's in - and some of it - and here's a $1 bill with Serial Number F 69474267A with blood on it. This was in your possession. And here is another $1 bill with blood on it with Serial Number G as in George 32230165 B. This was in your possession, too. Do you know how you got this money?

MR. CHRISTOPHER: No, sir.

MR. MORSE: And here is another dollar bill with blood on it, E as in Edward, 71111850 B. And you have in excess some $5 bills here. And it all comes to $59, which - here's a $10 bill. Here's a $5 bill with blood on it, I show you with Serial Number F 81501725 A as in Albert, with blood on it. Could you tell me how you got this money which is in excess of what you had in the beginning, and yet you came in here, into the Lee County Jail with $59 in assorted bills, United States currency.

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: And these bills I just informed you had blood on it. Here are two more. And here's another five with some blood on it bearing Serial Number E 74838896 A. And here's another $5 bill. You see the blood on the rear, sir? Robert Christopher, see the blood there?

MR. CHRISTOPHER: Yes.

MR. MORSE: And this is Serial Number I 32514699 A. And yet this is in excess of what you had. And you were brought in with this money. I show you this money and it has bloodstains on it. Is that true?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And yet it was in your possession?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Could you care to tell us how you got this money?

MR. CHRISTOPHER: I have no idea how that got to be (inaudible)

MR. MORSE: But - it was - you did have it in your possession?

MR. CHRISTOPHER: No, I only had about $20, $25.

MR. MORSE: Yes, but when you got booked in here, when you came into the Lee County Jail, right? The City Police brought you in here?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Right. You had this sum of money which is in excess of what you started with. Yet is [sic] has human blood on it. Do you remember how the blood got on this money?

MR. CHRISTOPHER: No, sir. I have no idea. I don't even know - I don't even know how I got that amount of money.

MR. MORSE: You don't know how you got that amount of money? I see. And did you purchase a - a bus ticket?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And where was the bus ticket for?

MR. CHRISTOPHER: Miami.

MR. MORSE: Miami. And how much was the bus ticket?

MR. CHRISTOPHER: I don't know.

MR. MORSE: Huh?

MR. CHRISTOPHER: I don't know.

MR. MORSE: You don't know how much the bus ticket was? I show you a bus ticket here from the Greyhound bus, and it's dated up here 12-22-70. And it's ticket Number 21520645 42.

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: This is the ticket that you purchased at the Greyhound Bus Station?

MR. CHRISTOPHER: I bought a ticket to go to Miami.

MR. MORSE: You bought a ticket.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And this ticket says from Fort Myers to Miami, Florida. Is that right?

MR. CHRISTOPHER: That's right.

MR. MORSE: Do you know how much this ticket cost?

MR. CHRISTOPHER: No, sir.

MR. MORSE: I see.

MR. CHRISTOPHER: No, I have no idea.

MR. MORSE: But you purchased that. Do you know what time you purchased this ticket?

MR. CHRISTOPHER: I had - I had just gone in and bought the ticket when - and I'd - I'd just sat down when the police came. I'd finished buying the ticket.

MR. MORSE: You just finished buying the ticket.

MR. CHRISTOPHER: When the police came.

MR. MORSE: I see. I see. And these cigarettes, these matches are yours?

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: And did you have any change with you when you were at the beach this morning?

MR. CHRISTOPHER: I don't know. I had gone in several bars (inaudible)

MR. MORSE: But did you have much silver?

MR. CHRISTOPHER: I guess, I had several (inaudible)

MR. MORSE: Well, you have $5.39 in assorted coins.

MR. CHRISTOPHER: $5, you (inaudible)

MR. MORSE: And 39 cents in assorted coins, consists of quarters, dimes nickles and pennies.

MR. CHRISTOPHER: Yeah.

MR. MORSE: And this all is in excess of what you originally started out with. I show you this here fingernail clipper. Is this yours?

MR. CHRISTOPHER: Uh,huh

MR. MORSE: That's yours. And these Chesterfield cigarettes are yours?

MR. CHRISTOPHER: Could I have a cigarette? Chesterfield?

UNIDENTIFIED VOICE: Sure.

MR. CHRISTOPHER: Yeah, I do smoke Chesterfield's.

UNIDENTIFIED VOICE: All right, certainly.

MR. SCHMIRLER: What do you do in San Francisco?

MR. CHRISTOPHER: I was born there. I don't do anything there.

MR. MORSE: I see. And --

MR. CHRISTOPHER: I was - I was working on a shrimp boat here.

MR. MORSE: I see. And --

MR. SCHMIRLER: What shrimp boat was it?

MR. CHRISTOPHER: Gulf Raider.

MR. SCHMIRLER: Who's your captain?

MR. CHRISTOPHER: Cox

MR. SCHMIRLER: What's his first name?

MR. CHRISTOPHER: Henry.

MR. SCHMIRLER: What was your job?

MR. CHRISTOPHER: There were just two men on the boat, I was second - first mate.

MR. MORSE: May I say something now? This is Sergeant Harry M. Morse speaking.

MR. CHRISTOPHER: Yeah. (inaudible)

MR. MORSE: I would like to initial these monies and - with the serial numbers with blood on it.

MR. CHRISTOPHER: Whatever you wish.

MR. MORSE: Is it alright and in your presence?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: I'll put today's date in 12-22-70 on each bill and I'll put my initials H.M. All right?

MR. MORSE: Do you - could you describe the - the lady taxicab driver to me that - that picked you up?

MR. CHRISTOPHER: No, sir. I have no idea.

MR. MORSE: She picked you up at the beach?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And drove you to Fort Myers. Is that right?

MR. CHRISTOPHER: No, sir. I never got to Fort Myers.

MR. MORSE: You never got to Fort Myers? Well, you - you were picked up at the bus station, the Greyhound bus station. That's in Fort Myers, isn't it?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: On Cleveland Avenue?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: So you must have got into Fort Myers somehow.

MR. CHRISTOPHER: I told you. I woke up in some water. I walked to the edge. I met somebody, asked 'em to buy me a shirt; they come out and said they could only buy three shirts. I offered them a dollar for their trouble.

MR. MORSE: Uh,huh.

MR. CHRISTOPHER: I was in a dazed condition.

MR. MORSE: Uh,huh.

MR. CHRISTOPHER: And they said I don't want the dollar. I said good-bye to them. I hitchhiked. I got picked up by five people in a car, I don't even remember who they were. And I asked them to drop me off at - at - at the bus station. And they dropped me off at a Howard Johnson's.

MR. MORSE: I see. All right, now --

MR. CHRISTOPHER: I don't even (inaudible)

MR. MORSE: But did you - you asked somebody, Robert Christopher, to buy you some T shirts? Right?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And these T shirts were purchased in Gibson's?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And Gibson's is located on Fowler in the City of Fort Myers. That's the only Gibson we have here.

MR. CHRISTOPHER: I don't know where it was.

MR. MORSE: Yeah.

MR. CHRISTOPHER: I woke up in some water.

MR. MORSE: I show you this --.

MR. CHRISTOPHER: I had to walk across the woods.

MR. MORSE: Robert Christopher, I show you this, the word Gibson here.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: You read and write?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: You see this word GIBSON right?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And it's got a price tag down on here. I believe it's $2.37, right? And it's sizes 42 to 44.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Right. And this was purchased in Fort Myers. So this would indicate you must have been into Fort Myers.

MR. CHRISTOPHER: All I know is I woke up; I had no shirt on. And I was laying in some water.

MR. MORSE: Uh,huh.

MR. CHRISTOPHER: I walked to the edge -- I - I walked out of the water, I climbed a fence, and I kept walking, and I came to a highway.

MR. MORSE: How did you get this blood on your pants and this undershirt you were wearing?

MR. CHRISTOPHER: I have no idea.

MR. MORSE: I notice, Robert, you have numerous scratches about your body. How'd you get those? And here's a scratch over here.

MR. CHRISTOPHER: I don't know.

MR. MORSE: You don't know. I see.

MR. CHRISTOPHER: I walked to this highway.

MR. MORSE: All right.

MR. CHRISTOPHER: I met this fat - fat guy.

MR. MORSE: Uh,huh.

MR. CHRISTOPHER: And I - I asked this fat guy.

MR. MORSE: (inaudible)

MR. CHRISTOPHER: I said, listen, I have no T shirt on. I said something happened to me, would you go buy, I have nothing on, would you go buy me one - one T shirt. I waited, he came out, he said all he could get was three T shirts in a package.

MR. MORSE: Uh,huh.

MR. CHRISTOPHER: I said okay, fine. Can I offer you a dollar? He said, no, that's okay.

MR. MORSE: I see.

MR. CHRISTOPHER: Then I started to hitch --. I proceeded to hitchhike.

MR. MORSE: I see.

MR. CHRISTOPHER: I got picked up and there about five people in a car. I said can I go to the bus station?

MR. MORSE: Right.

MR. CHRISTOPHER: And they let me off near the Howard Johnson's.

MR. MORSE: Right. I see. All right, Robert Christopher, I've already advised you of your rights and you understood 'em, right? And I have a form here with the words that I read to you, and if I mark down the time, which is now, and then read it to you again, would you sign it.

MR. CHRISTOPHER: Certainly.

MR. MORSE: Would you, please?

MR. CHRISTOPHER: Yeah.

MR. MORSE: So the place says here, it says up here Lee County Sheriff's Department,

Fort Myers, Florida, place, Lee County Jail, and the date is 12-22-70, and the time I have now is 10:59 P.M. And I will read this to you again. And would you like to read along with me? Your rights, before we ask you any questions you must understand your rights. You understand that?

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: You have the right to remain silent. You understand that?

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: This form says anything you say can be used against you in Court.

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: You understand that?

MR. CHRISTOPHER: (inaudible) -- Well, you know (inaudible)

MR. MORSE: Yes. All right. Now, you have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. You understand that? Right?

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: If you cannot afford a lawyer, one will be appointed to you before any questioning if you wish. All right? If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. All right? Now, down here it says waiver of rights. Can you read this?

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: What does this say?

MR. CHRISTOPHER: Waiver of rights.

MR. MORSE: All right. What does it say?

MR. CHRISTOPHER: I have read this statement of my rights, and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and

know what I am doing. No promises or threats have been made to me, and no pressure or coercion of any kind has been used against me.

MR. MORSE: (inaudible)

MR. CHRISTOPHER: I agree with all that, except - except for the fact --. What does this say. I do? As far as talking to you, what does this mean I do not want a lawyer?

MR. MORSE: At this particular time. Like I said to you before. You know, when I said to you verbally, if you decide.

MR. CHRISTOPHER: I agree with all that --.

MR. MORSE: Right.

MR. CHRISTOPHER: But I still want a lawyer. But as far --

MR. MORSE: Yeah, right.

MR. CHRISTOPHER: -- as talking to you - (inaudible)

MR. MORSE: Yeah. But right now you have consented without a lawyer present. Is that right?

MR. CHRISTOPHER: Certainly.

MR. MORSE: Oh, well, that's it. Would you please sign right here where I've made this check mark and Mr. Schmirler will witness your signature.

MR. CHRISTOPHER: I can't sign this as far as I do not waiver of right, this part. I can't sign that.

MR. SCHMIRLER: Which part can't you sign.

MR. CHRISTOPHER: That I do not want a lawyer at this time. I can't sign that.

MR. SCHMIRLER: In other words, you want a lawyer physically present right now, right here.

MR. CHRISTOPHER: Well, I can't - I can't sign a waiver of rights as far as --

MR. MORSE: Well, this is what (inaudible)

MR. CHRISTOPHER: -- as far as understanding --. As far as understanding that I don't have to say anything to you. That's one thing. Now, my cooperation, my attitude of cooperation is another thing. But as far as signing a waiver of rights.

MR. MORSE: Well, all this does is to verify (inaudible)

MR. CHRISTOPHER: I don't see why that includes that (inaudible)

MR. MORSE: Well, this is the form they - they have. It's a standard form that we use. And just so that you understand this.

MR. CHRISTOPHER: I understand (inaudible)

MR. MORSE: I mean, you've admitted already that you wanted to talk to me. In fact --

MR. CHRISTOPHER: Yeah.

MR. MORSE: -- what is [sic] says here, I've - I've said to you verbally, you know.

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: In its exact same thing. All this indicates is, right, I have read this statement. I want to ascertain, you know, that you can read and write.

MR. CHRISTOPHER: Uh,huh.

MR. MORSE: Isn't that true? And nobody wants to take advantage. Nobody's coerced you, nobody's putting --

MR. CHRISTOPHER: True, true.

MR. MORSE: --any pressure on you? Isn't that true?

MR. CHRISTOPHER: True, true.

MR. MORSE: Nobody's made any promises or threats, right?

MR. CHRISTOPHER: Right.

MR. MORSE: There's no personalities involved here, right?

MR. CHRISTOPHER: Correct.

MR. MORSE: So, and you - you consented to sign this and you did read this?

MR. CHRISTOPHER: I read that (inaudible)

MR. MORSE: Well, all this - well, all -

MR. CHRISTOPHER: (inaudible) waiver of rights.

MR. MORSE: Well, in other words, this means you understand what it is above that. I have read the state of my rights, and I understand my rights. In other words, I said to you before, do you understand --

MR. CHRISTOPHER: I don't wish to sign the waiver of rights, but I do wish to speak to you.

MR. MORSE: But you did wish to speak to me?

MR. SCHMIRLER: All this waiver of rights is saying is that - just what you said.

MR. MORSE: Just what you said.

MR. SCHMIRLER: It's saying that --

MR. MORSE: (inaudible)

MR. SCHMIRLER: -- you understand your rights, and you're willing to make a --

MR. MORSE: Well, that's all --

MR. SCHMIRLER: Statement.

MR. MORSE: Well, that all this means. If I could interpret it. I have read this statement. And you did read it, right.

MR. CHRISTOPHER: Right.

MR. MORSE: And I understand what my rights are. Right?

MR. CHRISTOPHER: (inaudible)

MR. MORSE: You understand 'em, don't you?

MR. CHRISTOPHER: Yeah.

MR. MORSE: And I am willing to make a statement and answer questions.

MR. CHRISTOPHER: True.

MR. MORSE: And you did.

MR. CHRISTOPHER: I don't wish to sign (inaudible)

MR. MORSE: But I don't want a lawyer at this time. Right?

MR. CHRISTOPHER: But I don't wish to sign anything that says I don't want a lawyer at this time. I'm not against having a lawyer.

MR. MORSE: No, if you want a lawyer that's your perfect right.

MR. CHRISTOPHER: Yeah.

MR. MORSE: When I advised you of your rights before, and I told you if you decide to answer --

MR. CHRISTOPHER: I'm speaking on a higher level of - of I understand what I might say --

MR. MORSE: Well, here, here.

MR. CHRISTOPHER: --might be held against me --

MR. MORSE: Here --

MR. CHRISTOPHER: --and I don't have to say anything. Now, I wish to talk to you at this time --

MR. MORSE: Right.

MR. CHRISTOPHER: --but I don't wish to sign a waiver of rights.

MR. MORSE: I see. Okay.

MR. CHRISTOPHER: Do you understand?

MR. MORSE: All right, all right.

MR. CHRISTOPHER: And I agree, there was no pressure or coercion on me, and I appreciate that fact. I realize the situation could be a little different, but --

(Noise in background)

MR. MORSE: It is now 11:05 P.M.

MR. SCHMIRLER: I have placed down here at the bottom under the check mark which Sergeant Morse made, the words refused to sign, but stated he wished to make a statement.

MR. CHRISTOPHER: Yes.

MR. SCHMIRLER: Is that a correct representation of the events that have taken place here? That you have refused to sign the form, but you have stated that you wished to --

MR. CHRISTOPHER: Yes.

MR. SCHMIRLER: --speak to us.

MR. CHRISTOPHER: Yes.

MR. SCHMIRLER: Is that correct?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: This has been witnessed by both myself and Sergeant Morse.

MR. MORSE: All right.

MR. CHRISTOPHER: Could I ask what I'm charged with? Why am I here?

MR. MORSE: Well, we have been talking to you and in regards to a crime of a very serious nature that has happened, and a person was stabbed to death. And in your possession is blood - money with blood on it. Your clothing with blood on it. And you are a suspect and -

MR. CHRISTOPHER: In connection with some stabbing?

MR. MORSE: Yes. Which resulted in a death.

MR. CHRISTOPHER: Death?

MR. MORSE: Uh,huh. The person died. A female taxi driver. Did you purchase a knife today while you were down at the beach?

MR. CHRISTOPHER: I don't remember.

MR. MORSE: No? I see.

MR. CHRISTOPHER: (inaudible) purchasing - purchasing any knife.

MR. MORSE: Well, on this here bus ticket here, with 2152064542. I'm going to put 12-22-70, and I'm going to put my initials on it, and Mr. Schmirler will initial the monies which I quoted to you plus this.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: All right. And while he's doing that, I'll be right back.

MR. CHRISTOPHER: In other words, I'm - I'm in connection with a stabbing?

MR. SCHMIRLER: You're being held while we investigate a stabbing.

MR. CHRISTOPHER: It was a lady taxi driver that got stabbed?

MR. SCHMIRLER: That's correct.

MR. CHRISTOPHER: A woman?

MR. SCHMIRLER: That's right. I have now initialed and dated the bus ticket and the bills in the numbers of which Sergeant Morse quoted to you earlier.

You say you woke up in some water.

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: What kind of - was this in a ditch or was it --.

MR. CHRISTOPHER: Something, yeah, just like that. It was like a ditch.

MR. SCHMIRLER: It was a ditch?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: You know where it was?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Was it fresh water or salt water?

MR. CHRISTOPHER: I don't know. Muddy, muddy.

MR. SCHMIRLER: Could you taste it?

MR. CHRISTOPHER: Muddy.

MR. SCHMIRLER: How deep was it?

MR. CHRISTOPHER: Not deep, but muddy, thick, muddy, like it wasn't deep water, but it was thick.

MR. SCHMIRLER: Well, how deep, knees?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Ankles?

MR. CHRISTOPHER: More than ankles, but there wasn't much water. It was like, you know, mud, mud with water.

MR. SCHMIRLER: Uh,huh. How big was this ditch?

MR. CHRISTOPHER: Oh, about as wide as this room.

MR. SCHMIRLER: About six feet wide?

MR. CHRISTOPHER: About that - no - no, more than six feet.

MR. SCHMIRLER: About 10 feet?

MR. CHRISTOPHER: Ten feet.

MR. SCHMIRLER: Ten feet wide?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: How deep was it? Like from the top of the ditch down to where you were?

MR. MORSE: All right --

MR. CHRISTOPHER: -- six inches deep, but the mud was deep.

MR. SCHMIRLER: Yeah, but how deep was it from the top of the ditch to where you were? You say it was a ditch. Did it have - did it have sides?

MR. CHRISTOPHER: It did and it didn't. It didn't have much sides. (inaudible)

MR. MORSE: All right. Mr. Dave Schmirler from the State's Attorney's office, he initialed all of these monies, these three $1 bills and there's one, two, three $5 bills, and plus this here ticket that was purchased at the Greyhound bus. Now, you asked me if you're gonna be charged with something.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And at this particular time, and I feel we have reasonable cause there, I am charging you with homicide in the first degree. Murder in the first degree.

MR. CHRISTOPHER: What does that mean?

MR. MORSE: Well, that means that you killed somebody.

MR. CHRISTOPHER: What does first degree mean?

MR. MORSE: Well, that there's premeditation.

MR. CHRISTOPHER: Premeditation?

MR. MORSE: Yeah. Now, it's up to the State's Attorney whether he wishes to reduce it to another charge or not, I don't know whether he will or not. But right now I am charging you with - with murder in the first degree. It's called homicide. Do you understand what I've said? I, Sergeant Harry M. Morse, have reasonable cause to believe under the existing circumstances that you were involved in this crime. Do you understand what I said?

MR. CHRISTOPHER: Yeah.

MR. MORSE: I see. Do you have anything else you'd like to say?

MR. CHRISTOPHER: I've - I've no knowledge of any murder whatsoever.

MR. MORSE: I see.

MR. CHRISTOPHER: Any murder.

MR. MORSE: All right.

MR. CHRISTOPHER: Certainly not premeditated.

MR. MORSE: Well.

MR. CHRISTOPHER: I was gonna get on a bus -- (inaudible)

MR. MORSE: You don't want to sign this waiver of rights?

MR. CHRISTOPHER: (inaudible)

MR. MORSE: Is that right?

MR. CHRISTOPHER: Yes.

MR. MORSE: Yes.

MR. MORSE: But you've made this statement to us, right?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: And you were advised and you haven't been coerced. So this is what you're charged with. All right, Robert.

MR. SCHMIRLER: Let me ask you a few questions. Are you through? Are you through?

MR. MORSE: Oh, one more question.

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Do you know anything about a woman being stabbed two years ago Thanksgiving Day in LaBelle about 17 times? She was stabbed to death.

MR. CHRISTOPHER: No, sir. I never -- (inaudible) LaBelle, I don't even know where LaBelle is.

MR. MORSE: In Hendry County?

MR. CHRISTOPHER: No, sir.

MR. MORSE: On State Road 80.

MR. CHRISTOPHER: No, sir.

MR. MORSE: Going east.

MR. CHRISTOPHER: No.

MR. MORSE: You don't know anything about that.

MR. CHRISTOPHER: Nothing about it.

MR. MORSE: All right. Dave Schmirler, would you like to ask some questions?

MR. SCHMIRLER: Right. I'd like to go back over some of this, and again, your rights still are in effect. You have the right to remain silent.

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: All these other rights which we read to you -- (inaudible)

MR. CHRISTOPHER: I understand that. I'm - I'm trying to make a separation between (inaudible) and trying to talk to you about whatever it is that's going on. I don't quite understand anything about murder, but I'm willing to cooperate.

MR. SCHMIRLER: Well, you realize that anything you do say can be used against you?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Let's start with the first thing today. You got out of jail. Is that right?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: How long had you been in jail.

MR. CHRISTOPHER: I'd been in jail about 50 - 40 - 50 days.

MR. SCHMIRLER: This was for carrying a concealed weapon?

MR. CHRISTOPHER: Yeah. I was a fisherman on the shrimp boat, and I went to a place and bought a fish knife because I had a job as a fisherman.

MR. SCHMIRLER: Uh,huh.

MR. CHRISTOPHER: Then I went to a place and had a cup of cofee after I'd bought the fish knife. Whe I was having a cup of coffee an officer walked in and said a waitress had called that someone was there with a knife. But I was a fisherman with a fish knife. I was just having coffee. I wasn't causing any trouble.

MR. SCHMIRLER: Okay. Well --

MR. CHRISTOPHER: And I got arrested.

MR. SCHMIRLER: I'm not interested in that case.

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: This is -- this is water over the bridge now.

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: I'm interested in tonight - today and tonight, the events of today and tonight.

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: When did you get out of the jail today?

MR. CHRISTOPHER: It must have been about 10:00 o'clock.

MR. SCHMIRLER: What did you do after you got out of jail?

MR. CHRISTOPHER: Went to a bar.

MR. SCHMIRLER: Which bar.

MR. CHRISTOPHER: Lucies, I think.

MR. SCHMIRLER: Lucies?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Where is that?

MR. CHRISTOPHER: I don't know what street it's on.

MR. SCHMIRLER: Do you know where it is? What town it's in?

MR. CHRISTOPHER: It's right in town.

MR. SCHMIRLER: Is it walking distance from the jail?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Okay. What did you do at the bar?

MR. CHRISTOPHER: I had - had a couple of beers.

MR. SCHMIRLER: Couple of beers?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Remember what brand it was?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Were they draft, or were they in a bottle?

MR. CHRISTOPHER: Draft beer, I think.

MR. SCHMIRLER: Draft? You got 'em in a glass?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Was it a glass or a mug?

MR. CHRISTOPHER: Mug.

MR. SCHMIRLER: (inaudible)

MR. CHRISTOPHER: (inaudible)

MR. SCHMIRLER: And what did you do after that?

MR. CHRISTOPHER: Then I went to another bar.

MR. SCHMIRLER: Were you sober when you went to that other bar?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Which other bar did you go to?

MR. CHRISTOPHER: I don't know the name of it.

MR. SCHMIRLER: Where was it?

MR. CHRISTOPHER: In town.

MR. SCHMIRLER: How far from Lucies?

MR. CHRISTOPHER: Not far, I don't know (inaudible)

MR. SCHMIRLER: Was it across the street?

MR. CHRISTOPHER: Might have been.

MR. SCHMIRLER: Or was it next door?

MR. CHRISTOPHER: I don't --. See, I don't know the town that well.

MR. SCHMIRLER: Okay. What did you do in this other bar?

MR. CHRISTOPHER: Had some drinks.

MR. SCHMIRLER: What kind of drinks?

MR. CHRISTOPHER: Beer, I guess, I don't know.

MR. SCHMIRLER: Beer?

MR. CHRISTOPHER: Yeah, beer, Schlitz, I drink Schlitz, Schlitz.

MR. SCHMIRLER: Did you drink that out of a can or a bottle or a glass?

MR. CHRISTOPHER: It was poured in a glass, I guess.

MR. SCHMIRLER: Was it draft beer?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Okay. Did you see anybody in either of these two bars that you knew?

MR. CHRISTOPHER: No. Nobody.

MR. SCHMIRLER: Did you talk to anybody?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Just enough to order the beer?

MR. CHRISTOPHER: Just to order the beer, play the juke box.

MR. SCHMIRLER: How did you pay for the beer?

MR. CHRISTOPHER: Money.

MR. SCHMIRLER: What kind of money? Paper money, coins, what?

MR. CHRISTOPHER: Paper.

MR. SCHMIRLER: Where did you have it?

(End of Side A of tape).

MR. SCHMIRLER: The money you had was money you had before you were arrested the first time then?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: And how much was that?

MR. CHRISTOPHER: Well, I - I got arrested with about a hundred and fifty dollars. I mean I had a hundred and fifty dollars while I was in here.

MR. SCHMIRLER: How much did you have when you got out?

MR. CHRISTOPHER: Twenty-five.

MR. SCHMIRLER: Where did the other hundred and twenty-five go?

MR. CHRISTOPHER: Spent it.

MR. SCHMIRLER: Where did you spend it?

MR. MORSE: While he was in jail.

MR. CHRISTOPHER: Well, I was in jail a couple of months.

MR. SCHMIRLER: You spent a hundred and twenty-five bucks?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: On what?

MR. CHRISTOPHER: Candy and cigarettes.

MR. SCHMIRLER: That's a lot of candy and cigarettes, isn't it?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Nothing else to do?

MR. CHRISTOPHER: Huh?

MR. SCHMIRLER: Nothing else to do?

MR. CHRISTOPHER: Well, I've been mentally - I'm very mentally disturbed.

MR. SCHMIRLER: Yeah, I understand.

MR. CHRISTOPHER: (inaudible)

MR. SCHMIRLER: Did you lose some in a poker game upstairs?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Did you win any?

MR. CHRISTOPHER: no.

MR. SCHMIRLER: Did you play poker.

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Okay. I don't care, I'm just wondering.

Okay after the second bar --?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Where did you go then? What did you do?

MR. CHRISTOPHER: I called - I called ---. See, I had some clothes on -- on the boat that I was working.

MR. SCHMIRLER: Yeah.

MR. CHRISTOPHER: And I called the captain.

MR. SCHMIRLER: Yeah.

MR. CHRISTOPHER: And someone answered and said - I asked if he was home or would - or would he be home for Christmas. I figured he wouldn't. I figured I wanted - I wanted to get the clothes and I figured he wouldn't be going out Christmas. And they said, yes, that's true, he won't be going out Christmas, they said he's docked right in town. And I

went over to the dock right in town. And there was no boat there. And then I went to the other dock; there's two docks right in town, and there was no dock. So I took a cab. I can't remember where I got the cab, down to the beach. And I went right down to the end of the beach. You know, where the ocean is?

MR. SCHMIRLER: Yeah.

MR. CHRISTOPHER: I was drinking there.

MR. SCHMIRLER: Okay. Hold it just a minute. Now you called what? Captain Cox?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: You called him at his home?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Okay. Do you know who answered?

MR. CHRISTOPHER: A male, but I don't -- (inaudible)

MR. SCHMIRLER: Was it a male?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Sound like a younger male --

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: --or older male?

MR. CHRISTOPHER: Yes, younger. No, well, about, sounded about 20.

MR. SCHMIRLER: Okay. About what time was this?

MR. CHRISTOPHER: I have no idea.

MR. SCHMIRLER: Was it morning, afternoon?

MR. CHRISTOPHER: I don't know. Must've been - must've been --. I remember looking at the clock, and I remember it was twenty of 11:00. And I said I don't - I don't think I'll call before 11:00 o'clock A.M. So it must've been after 11:00 A.M.

MR. SCHMIRLER: Where did you call from?

MR. CHRISTOPHER: The bar I was in.

MR. MORSE: What time did you get into the taxi?

MR. CHRISTOPHER: I don't know.

MR. SCHMIRLER: How did you get the taxi?

MR. CHRISTOPHER: I don't - I don't remember.

MR. SCHMIRLER: Well, did you call it over, did you call a taxi stand, did you go to a taxi stand?

MR. CHRISTOPHER: I'm trying to think. I don't remember.

MR. SCHMIRLER: Was there --?

MR. MORSE: You just made a statement (inaudible)

MR. SCHMIRLER: Was the driver a male or a female?

MR. CHRISTOPHER: I don't remember.

MR. SCHMIRLER: This is going to the beach?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: All right. You went to the beach in a taxi?

MR. CHRISTOPHER: Female.

MR. SCHMIRLER: Female going to the beach?

MR. CHRISTOPHER: Going to the beach.

MR. SCHMIRLER: All right. How much did it cost you to get to the beach?

MR. CHRISTOPHER: I don't know. $5 or $6.

MR. SCHMIRLER: Did you pay it?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Then what did you do then?

MR. CHRISTOPHER: I got right out at Gino's or someplace where - where I go when I go there right by the (inaudible)

MR. SCHMIRLER: And you went into Gino's?

MR. CHRISTOPHER: I don't remember. No, no, I went right where the sunbathers are

where there's a, right at the end - right at the end of the beach.

MR. SCHMIRLER: Uh,huh.

MR. CHRISTOPHER: You go straight.

MR. SCHMIRLER: Yeah.

MR. CHRISTOPHER: There's a, there's like a walk.

MR. SCHMIRLER: Yeah.

MR. CHRISTOPHER: There's a beach. And that's where --.

MR. SCHMIRLER: What did you do there?

MR. CHRISTOPHER: Had something to eat and drink, I guess.

MR. SCHMIRLER: What did you eat?

MR. CHRISTOPHER: I don't remember.

MR. SCHMIRLER: Remember what you had to drink?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Were you sober at this time?

MR. CHRISTOPHER: Yes and no. I don't remember what I had.

MR. SCHMIRLER: Did you have any weapons at this time?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Okay. How long did you stay there?

MR. CHRISTOPHER: I don't know.

MR. SCHMIRLER: Do you remember leaving?

MR. CHRISTOPHER: Not really. But I remember being somewhere else when I called -- when they called a cab to go to the bus station.

MR. SCHMIRLER: Where else? Where is this somewhere else?

MR. CHRISTOPHER: I don't know.

MR. SCHMIRLER: Okay. Do you know about what time it was?

MR. CHRISTOPHER: I have no idea what time it was.

MR. SCHMIRLER: Can you describe the place you were in when you called for the taxi?

MR. CHRISTOPHER: Yeah, there was a very attractive girl there, black hair.

MR. SCHMIRLER: Uh,huh. What was she wearing?

MR. CHRISTOPHER: Black and white, I think.

MR. SCHMIRLER: I mean what kind of an outfit was it? Was it a dress?

MR. CHRISTOPHER: I don't know any - it was just an attractive black hair, white and black outfit.

MR. SCHMIRLER: What was the place like?

MR. CHRISTOPHER: Nice place. I asked her would you call me a cab, I want to go to the bus station.

MR. SCHMIRLER: Were you inside?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Were you sitting at a bar?

MR. CHRISTOPHER: Sitting down.

MR. SCHMIRLER: Were you at the bar?

MR. CHRISTOPHER: Yes, sir, at the bar.

MR. SCHMIRLER: What did the bar look like?

MR. CHRISTOPHER: Walked in, and the bar was here. When I walked in, the bar was here.

MR. SCHMIRLER: When you walked in the bar was on your right?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Okay.

MR. CHRISTOPHER: And I sat on this side of the middle.

MR. SCHMIRLER: You sat --?

MR. CHRISTOPHER: - on this side, about the middle (inaudible)

MR. SCHMIRLER: On the right side of the middle?

MR. CHRISTOPHER: Yes, sir. Before - it was a break in the bar, I guess where they walk out. And I sat just on this side.

MR. SCHMIRLER: What did you sit on?

MR. CHRISTOPHER: (inaudible)

MR. SCHMIRLER: A stool, a chair?

MR. CHRISTOPHER: I can't describe it --. Stool, stool. Must've been a stool.

MR. SCHMIRLER: Did it have a back on it?

MR. CHRISTOPHER: Leather. Black leather.

MR. SCHMIRLER: Black leather?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Did it have a back on it?

MR. CHRISTOPHER: I don't know.

MR. SCHMIRLER: Did it spin?

MR. CHRISTOPHER: I don't - I have no idea.

MR. SCHMIRLER: I mean when you turned--?

MR. CHRISTOPHER: I don't know.

MR. SCHMIRLER: Was the bar shiney?

MR. CHRISTOPHER: I don't know.

MR. SCHMIRLER: Was it wood?

MR. CHRISTOPHER: I don't know whether it was wood or what.

MR. SCHMIRLER: Where did they keep the bottles?

MR. CHRISTOPHER: On the other side, left-hand side.

MR. SCHMIRLER: Left-hand side? Were they stacked up?

MR. CHRISTOPHER: I don't know.

MR. SCHMIRLER: Did you drink hard stuff or beer.

MR. CHRISTOPHER: I don't know.

MR. SCHMIRLER: What do you usually drink?

MR. CHRISTOPHER: Both. Hard stuff with beer.

MR. SCHMIRLER: Okay. What kind of hard stuff do you drink?

MR. CHRISTOPHER: Anything from Tequila to whisky straight. I drink whisky straight. I always drink whisky straight.

MR. SCHMIRLER: Did you ever take any drugs?

MR. CHRISTOPHER: Years ago.

MR. SCHMIRLER: What kind of drugs were they?

MR. CHRISTOPHER: Mostly speed.

MR. SCHMIRLER: Where did you take it?

MR. CHRISTOPHER: Main line, everwhere.

MR. SCHMIRLER: How long has it been since you've had any?

MR. CHRISTOPHER: Years.

MR. SCHMIRLER: How many?

MR. CHRISTOPHER: Many years; six years, seven years.

MR. SCHMIRLER: Ever tried anything else?

MR. CHRISTOPHER: Heroin, cocaine. I shoot everything main line.

MR. SCHMIRLER: How long has it been since you've had any of anything?

MR. CHRISTOPHER: Quite a few years.

MR. SCHMIRLER: You just stopped?

MR. CHRISTOPHER: Yeah.

MR. SCHMIRLER: Did you go through a cure?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Where was that?

MR. CHRISTOPHER: No, I just - my own cure.

MR. SCHMIRLER: You went through your own cure?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Were you hooked on it?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: And you cured yourself?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Ever been in the service?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: What branch?

MR. CHRISTOPHER: Army.

MR. SCHMIRLER: Where did you serve?

MR. CHRISTOPHER: (No response.)

MR. SCHMIRLER: Do you remember where you served?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Remember where you enlisted?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Remember where you got out?

MR. CHRISTOPHER: San Francisco. San Francisco.

MR. SCHMIRLER: How long were you in?

MR. CHRISTOPHER: Three years.

MR. SCHMIRLER: How high did you get? PFC, Sergeant?

MR. CHRISTOPHER: No, I - I --. I got released in basic training.

MR. SCHMIRLER: You got released in basic training?

MR. CHRISTOPHER: Yeah.

MR. SCHMIRLER: Then you didn't serve three years.

MR. CHRISTOPHER: (inaudible)

MR. SCHMIRLER: Okay, let's forget about the Army.

Do you have any idea, was it light out, was it dark, anything when you called this cab tonight?

MR. CHRISTOPHER: Light.

MR. SCHMIRLER: It was light?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: It hadn't gotten dark yet?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: Okay. How long did you wait for the cab?

MR. CHRISTOPHER: Seemed like 10 minutes.

MR. SCHMIRLER: The cab came up?

MR. CHRISTOPHER: Yeah.

MR. SCHMIRLER: Were you still inside the bar?

MR. CHRISTOPHER: Yeah.

MR. SCHMIRLER: Did the driver come in to get you?

MR. CHRISTOPHER: No, the barmaid told me the cab's outside.

MR. SCHMIRLER: She said the cab's outside?

MR. CHRISTOPHER: Yeah.

MR. SCHMIRLER: And what did you do then?

MR. CHRISTOPHER: Went outside. I got in the cab and I said go to the bus station. And we drove for a while, and I

don't remember anything that happened after that. And then I woke up in this water.

MR. SCHMIRLER: Which way did you drive?

MR. CHRISTOPHER: She went down, she took a right, and she went straight.

MR. SCHMIRLER: She went down and took a right?

MR. CHRISTOPHER: Yeah.

MR. SCHMIRLER: Then she went straight?

MR. CHRISTOPHER: Yeah. She stopped and we changed cabs.

MR. SCHMIRLER: You changed cabs?

MR. CHRISTOPHER: Yeah.

MR. SCHMIRLER: Where did she stop?

MR. CHRISTOPHER: I don't know. Some place. Just that --. We went down and took a right and then just not shortly after we took a right, she stopped.

MR. MORSE: On San Carlos Boulevard?

MR. CHRISTOPHER: I don't know (inaudible)

MR. MORSE: Was it like near a trailer park?

MR. CHRISTOPHER: Yeah, trailers.

MR. MORSE: Was - there were trailers?

MR. CHRISTOPHER: Yeah, trailers. American flag.

MR. MORSE: Yeah. And - and did -- ?

MR. CHRISTOPHER: She said --. She went inside a trailer.

MR. MORSE: She went inside a trailer? She left the trailer?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: She left the cab and went inside the trailer?

MR. CHRISTOPHER: Yes, sir.

MR. MORSE: Right?

MR. CHRISTOPHER: Yeah.

MR. MORSE: And then she came out and she got in the taxi, right?

MR. CHRISTOPHER: She said, we've got to change my husband's cab from my cab. No, we

have to change from - we have to change from my husband's cab.

MR. MORSE: Right.

MR. CHRISTOPHER: We changed cabs.

MR. MORSE: Right.

MR. CHRISTOPHER: And then she --.

MR. MORSE: What color was the cab?

MR. CHRISTOPHER: I don't know.

MR. MORSE: Was it a white cab?

MR. CHRISTOPHER: White, light.

MR. MORSE: Was it a Chevrolet?

MR. CHRISTOPHER: I don't know.

MR. MORSE: You don't know what it was. Was it a two door or a four door.?

MR. CHRISTOPHER: I don't know.

MR. MORSE: (inaudible)

MR. CHRISTOPHER: Four door.

MR. MORSE: Four door?

MR. CHRISTOPHER: Yeah.

MR. MORSE: I see.

MR. SCHMIRLER: Were you sitting in front or back?

MR. CHRISTOPHER: Back.

MR. MORSE: Sitting in the back.

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: You changed cabs?

MR. CHRISTOPHER: Yes.

MR. SCHMIRLER: Anybody else in the cab? You and the driver or anybody else?

MR. CHRISTOPHER: No one else at that time.

MR. SCHMIRLER: What did you do then?

MR. CHRISTOPHER: Then we drove further on. She stopped - no, it must've been 15 minutes at least. She drove quite a while, and she stopped and she picked up two guys.

MR. SCHMIRLER: What did they look like?

MR. CHRISTOPHER: Big.

MR. SCHMIRLER: How were they dressed?

MR. CHRISTOPHER: I don't know. I don't remember.

MR. SCHMIRLER: Where did they sit?

MR. CHRISTOPHER: Sat in back.

MR. SCHMIRLER: Both of them?

MR. CHRISTOPHER: Yeah.

MR. SCHMIRLER: One on each side of you?

MR. CHRISTOPHER: Yes, sir.

MR. SCHMIRLER: Then what happened?

MR. CHRISTOPHER: I don't remember anything after that.

MR. SCHMIRLER: Once they got in the car, you don't remember anything after that?

MR. CHRISTOPHER: No. We should take a certain amount of time to get to the city, and I can only remember going a certain amount of time. Like instead of getting to the city, I can only remember like a stretch of - like we drove down a road, a long raod, a certain amout of stretch of time, and I can't remember anything after that.

MR. MORSE: Is that San Carlos Boulevard and then it turned into McGregor Boulevard?

MR. CHRISTOPHER: Straight to the city, yes, sir, as far as I know.

MR. MORSE: Straight to the city it went?

MR. CHRISTOPHER: Yeah.

MR. MORSE: I see.

MR. SCHMIRLER: Where did you stop when you picked up these other two guys?

MR. CHRISTOPHER: I don't know the address.

MR. SCHMIRLER: Didn't you think it was kinda' funny to pick up two other guys when you've already got a fare?

MR. CHRISTOPHER: No, she said she wanted to pick up another fare.

MR. SCHMIRLER: Did she tell you how much it was gonna' cost to get to the city?

MR. CHRISTOPHER: She said it was $5 and she said I want to pick up another fare. Then she said I'm gonna' change cabs. She told me she was gonna' pick up another fare before she changed cabs.

MR. SCHMIRLER: When was the last time --?

MR. CHRISTOPHER: I was right, there was a trailer park.

MR. MORSE: Where she stopped for the taxi, right?

MR. CHRISTOPHER: Yeah, but she didn't drive into the trailer park, it was the first trailer.

MR. MORSE: Right.

MR. CHRISTOPHER: There was an American flag there.

MR. MORSE: Right.

MR. CHRISTOPHER: That I remember.

MR. MORSE: Right.

MR. SCHMIRLER: When was the last time you saw the taxi driver?

MR. CHRISTOPHER: We drove --. She stopped at the trailer park. Was, say, the beach is here, trailer park is here and the city is here. Right? She must have drove

this far. Something like that. That's the last I remember.

MR. SCHMIRLER: Did you get your fish knife back when you were let out of jail?

MR. CHRISTOPHER: No.

MR. SCHMIRLER: This will conclude the interview at 11:30 P.M.

STATE OF FLORIDA)

COUNTY OF LEE)

I, B. Schultz, Official Court Reporter for the 20th Judicial Circuit of the State of Florida, do hereby certify that this is a transcript of a recording introduced into evidence in the cause styled in the caption hereto, on Page 1 hereof; that I was authorized to and did transcribe said recording to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of June, 1974.

[s] _____

B. Schultz, Official Court Reporter

20th Judicial Circuit of Florida

ORIGINAL

Supreme Court, U.S.
FILED
MAY 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 87-1781

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

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RICHARD L. DUGGER, Secretary, Florida Department of Offender Rehabilitation,

Petitioner,

v.

JON S. MILLER,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

WHETHER THE LOWER COURT PROPERLY INTERPRETED COLORADO V. CONNELLY, 479 U. S. ____, 107 S. Ct. 515 (1986), AS CONTINUING TO REQUIRE THAT A CRIMINAL DEFENDANT HAVE THE MENTAL CAPACITY TO WAIVE HIS CONSTITUTIONAL RIGHTS KNOWINGLY AND INTELLIGENTLY BEFORE ADMITTING AT TRIAL ANY INCULPATORY STATEMENTS MADE BY THE DEFENDANT TO POLICE OFFICERS DURING A CUSTODIAL INTERROGATION.

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## JURISDICTIONAL STATEMENT

Petitioner fails to state which of the specific provisions of Rule 17, Rules of the Supreme Court of the United States, it invokes in petitioning this Court for writ of certiorari. Respondent submits that subparts (a) and (b) of Rule 17 are inapplicable and provide no basis for the petition for writ of certiorari. Respondent further submits that where, as here, the Petitioner requests only that the Court clarify its holding in Colorado v. Connelly, 479 U.S. _____, 107 S.Ct. 515 (1986), subpart (c) of Rule 17 is equally unavailing.

## STATEMENT OF THE CASE

As expressly noted by the Court of Appeals, the Respondent Jon S. Miller had a history of mental illness prior to his arrest. (A-11, n.4)[1]. According to his own testimony at trial, Miller abused drugs during the 1960's, and was hospitalized or treated for mental conditions at various times from 1960 to 1965 in Belleview Mental Hospital in New York, St. Mary's Hospital in San Francisco, Tampa General Hospital, and in Massachusetts. (Tr. 3-311 through 315, 3-345).

The record further establishes that following his arrest and after counsel was appointed to represent him, the state trial court appointed two psychiatrists to evaluate Miller's competency to stand trial. (Tr. 5-889,890). These psychiatrists agreed that Miller was incompetent to stand trial. (Tr. 5-893, 894). Miller therefore was committed to the Florida State Hospital where he received psychiatric care and treatment for two and one half years before the court determined that his competency had been restored sufficiently to stand trial. (Tr.5-904, 911, 1095).[2]

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[1] As used herein, "A-___" refers to the appendix to the petition for writ of certiorari and the relevant page number; "Tr. 3-311" refers to the state trial court transcript and relevant volume and page number, e.g., here volume 3, page 311; "Pet-____" refers to the petition for writ of certiorari and the relevant page number; "SCT - ___" refers to the volume of the state court trial transcript entitled "State Court Transcript of Record Index" and the page number of said volume; and "R-___" refers to the record on appeal and the docket entry to said record.

[2] Despite this finding, the same court later sentenced Miller, after trial, to death based in part upon its finding that he was suffering from an incurable and dangerous mental illness at the time of the murder. (R-11; see Miller v. State, 373 So.2d 882 (Fla. 1979)).

At trial, the court appointed psychiatrists testified that Miller was insane at the time he committed the murder. (Tr. 3-385 through 3-440, 4-445 through 4-464). The police officer who arrested Miller testified that at the time of his arrest Miller stated that an atomic bomb was going to explode (Tr. 2-180), and that he acted irrationally, appeared to hallucinate, laughed, talked to himself, and at times was unresponsive to questions. (Tr. 2-180,181). The Lee County jailor responsible for Miller on the night of his arrest testified that Miller acted abnormal in his presence and that Miller's strange behavior did not appear alcohol related but rather the behavior of one who was incompetent or on drugs. (Tr. 3-277, 279, 280). The jailor further testified that at the time of trial, after Miller had spent approximately two and one half years being treated in mental institutions, Miller appeared different than on the night of his arrest. (Tr. 3-281).

Witnesses who observed Miller on the afternoon of the murder also testified that he was mumbling to himself, that he appeared angry, that a wild look and change came over him when he purchased a knife, and that they were sufficiently alarmed by his unusual manner to call the police. (Tr. 2-30, 33 through 35). Finally, Miller's cellmate testified that on the night of Miller's arrest and interrogation, Miller would jump on his bed, pull his feet under him and yell "chicken man". (Tr. 3-205). Thus, there was substantial competent evidence before the state trial court that at the time of the murder and his interrogation several hours later, Miller was insane and without the capacity knowingly and intelligently to waive his constitutional rights.

The record below also indicates that Miller did not knowingly and intelligently waive his constitutional rights, and

contradicts the assertion of the Petitioner that the police officers interrogating Miller "had no indication that [he] was of insufficient intelligence to understand the rights he was waiving or what the consequences of his waiver would be". (Pet-16). The record further contradicts Petitioner's assertion that the record clearly establishes Miller's willingness to waive his rights and continue the interrogation. (Pet-16,17).

Miller, who identified himself at the time of the interrogation as Robert Christopher, initially responded to the officers' request that he waive his constitutional rights and speak with them as follows: "I receive the vibrations, I mean I received the -- the general attitude, and I -- and I understood that I could remain silent, but I understood your attitude , and I -- I decided I'd like to (inaudible)." (A-69; SCT-975 through 977). While Miller later stated that he understood his rights, as expressly noted by the Court of Appeals most of his responses to the officers' questions were "yeah" or "uh huh" and when the officers again reminded Miller of his rights, he appeared confused and disoriented. (A-10). Still later during his interrogation, Miller refused to sign a form indicating that he understood his rights and became more passive and uncooperative. (A-10; SCT-998 through 1000). Finally, Miller specifically informed the officers during the interrogation "[w]ell, I've been mentally -- I'm very mentally disturbed", to which one of the officers responded, "[y]eah, I understand" and then changed the subject. (A-9, n.3; SCT-1020). Thus, the record also raises clear questions whether Miller had in fact waived his constitutional rights intelligently and knowingly, and whether the police officers' should have been aware of his inability to do so.

## SUMMARY OF ARGUMENT

Some twenty-eight years ago, this Court in Blackburn v. Alabama, 361 U.S. 199, 207 (1960) noted that the use of a confession given to police officers while the defendant was incompetent affronts our civilization's most basic sense of justice. This Court has consistently reiterated this principle in its subsequent decisions, most recently in Colorado v. Connelly, 479 U. S. ____, 107 S.Ct. 515 (1986). Petitioner attempts herein, however, to limit this long established principle to instances in which the defendant, at the time of the confession, exhibits an objective manifestation of his inability to understand his constitutional rights, and cites the Colorado v. Connelly decision as authority for its argument.

Respondent submits that the Court of Appeals properly rejected Petitioner's argument and followed the clear instruction provided by this Court's prior decisions, including Colorado v. Connelly, which champion the rights of incompetent defendants and abhor the evidentiary use of confessions or admissions made by defendants while incompetent. To ensure to incompetent defendants the continued fundamental fairness and freedom from self incrimination guaranteed by the Fourteenth Amendment to all citizens--competent and incompetent alike--this Court should deny the petition for writ of certiorari and allow the mandate of the Court of Appeals to issue.

## ARGUMENT

**The Court of Appeals properly interpreted Colorado v. Connelly as continuing to require that a criminal defendant have the mental capacity to waive his constitutional rights knowingly and intelligently before admitting at trial any inculpatory statements made by the defendant to police officers during a custodial interrogation.**

The Petitioner argues that the Court of Appeals by its decision has established a standard for determining the "intelligence" of a waiver which does not comport with constitutional dictates, (Pet-7), and that "[c]ompetency to confess is not an issue arising under the United States Constitution." (Pet-9). Petitioner further argues that Colorado v. Connelly established that the only questions to be addressed by courts in determining the admissibility of a confession is whether the police obtained the confession through coercion and/or whether the defendant exhibited an objective manifestation of his understanding and waiver of his constitutional rights. Absent such objective manifestation, Petitioner argues, there cannot be any police overreaching rendering an insane defendant's custodial statements inadmissible at trial.

Respondent submits that contrary to Petitioner's argument, the Court of Appeals did not establish a new standard regarding the admissibility of confessions. Rather, the Court of Appeals merely followed long established principles established by this Court in numerous decisions which require that before a confession elicited by police officers during a custodial interrogation is admitted into evidence, the state must first establish that the a defendant knowingly and intelligently waived

his constitutional rights. Respondent further submits that a criminal defendant's competency to confess involves an issue that this Court has long held to be an integral part of the fundamental fairness doctrine of the Fourteenth Amendment to the United States Constitution. Finally, Respondent submits that Colorado v. Connelly recognized and reaffirmed these principles and merely noted that where a criminal defendant has the ability to know and understand his rights so as to make a knowing waiver, the courts will not examine the defendant's motive for exercising such rights absent overreaching conduct by the police.

The facts of Colorado v. Connelly are simple but important. There, unlike the instant case, the defendant initiated the communications with the police regarding the crime. The defendant simply approached a police officer on the street, stopped him and confessed to a crime. The police officer then informed the defendant of his constitutional rights, which the defendant acknowledged and waived. The police then took the defendant into custody, at which time the defendant continued to volunteer statements regarding the crime. Based upon this information, the state charged the defendant with the crime.

At trial, however, the defendant alleged that his statements to the police were involuntary. He alleged that the statements were involuntary because his "free will" had been overborne by voices of God telling him that confessing the crime was the right thing to do. Unlike the instant case, however, the defendant did not allege that he did not have the capacity to understand his constitutional rights at the time he made the statements. Indeed, all of the evidence before the Court was that the defendant's cognitive abilities were not impaired and that he

understood the rights as read by the police officer, 479 U.S. at _____, 107 S.Ct. at 519, a point expressly acknowledged by the Court of Appeals below. (A-38). The issue before this Court in Colorado v. Connelly, therefore, was not, as in the instant case, whether the defendant's mental capacity rendered his statements involuntary because he was not competent to waive his constitutional rights knowingly and intelligently; rather, the issue was whether the defendant's motive or reason for confessing should be considered a basis upon which to consider the statements involuntary.

This Court understandably declined to enter the potential judicial morass of weighing the myriad of potential reasons and motives why defendants give confessions, with one caveat: where police conduct is alleged to be overreaching and coercive so as to serve possibly as the motive or reason for the defendant's confession, then the Courts will look to the defendant's motive for making the inculpatory statement. Thus, this Court held that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." 479 U.S. at _____, 107 S.Ct. at 520 (footnote omitted). Under the facts of Colorado v. Connelly, therefore -- where the defendant's cognitive abilities were not impaired, he inititated all communications with the police, and the police conduct was proper -- this Court held that the confession was voluntary. Thus, the specific holding of this Court in Colorado v. Connelly is that where a defendant has the ability to understand his rights and actions, the Court will not examine the defendant's motive for making the confession absent coercive activities by the police.

The Petitioner improperly argues, however, that Colorado v.

Connelly stands for the proposition that a criminal defendant's constitutional rights cannot be violated during a custodial interrogation unless there is overreaching conduct by the police or the defendant objectively manifests an inability to exercise his rights. This interpretation, as discussed above, is simply incorrect. In drawing this broad brush conclusion, the Petitioner fails to acknowledge that this Court predicated its holding in Colorado v. Connelly on a crucial finding absent in this case, a finding that the defendant was competent and had the cognitive abilities to understand and exercise his constitutional rights knowingly and intelligently. The Colorado v. Connelly decision simply held that where a defendant has this capacity, the Court will not attempt to evaluate the propriety of the motive or reason which convinced the defendant to confess. Absent coercive activities by the police, the defendant's motive is irrelevant as long as he has the ability otherwise to understand and exercise his constitutional rights.

The important distinction between this case and Colorado v. Connelly, therefore, as noted by the Court of Appeals, is that the defendant therein had the cognitive ability to understand and exercise his constitutional rights while the Respondent in this action did not. Under such circumstances, the strict holding in Colorado v. Connelly requires that Respondent's conviction be overturned as based upon an involuntary confession, and therefore fundamentally unfair. Indeed, it is difficult to conceive of a situation that is more involuntary and unfair than allowing the police to elicit statements from an accused who is incompetent and unable to understand his constitutional rights or control his responses. As noted by this Court over twenty-six years ago,

> "[s]urely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the

> basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion."

Blackburn v. Alabama, 361 U. S. 199, 207 (1960).

The aim of the Fourteenth Amendment's requirement of due process is in part to prevent fundamental unfairness in the use of evidence. Colorado v. Connelly, 479 U.S. at ____, 107 S.Ct. at 483. If ever a situation gives rise to such fundamental unfairness, the circumstances of the instant case do. When taken into custody and interrogated for over an hour by two policemen, Respondent was incapable of thinking rationally and powerless to exercise his constitutional rights and to protect himself. Indeed, given Respondent's condition the police officers reading to him his constitutional rights was the equivalent of not reading such rights to a competent defendant. This Court in Miranda v. Arizona, 384 U.S. 436 (1966) established over twenty years ago, however, that this latter situation violated constitutional protections regardless of whether the police actions were otherwise proper. To ensure this same fundamental fairness and freedom from self incrimination to incompetent defendants, this Court must similarly condemn the procedure employed below.

Indeed, under such circumstances the actions of the police officers should be considered "overreaching" in nature if such a finding is necessary to exclude the defendant's custodial statements from trial. As acknowledged by Petitioner, this Court in Miranda v. Arizona, 384 U.S. 436 (1966) recognized "the presumptive coercion arising from custodial interrogation."

(Pet-9). To the extent, therefore, that Colorado v. Connelly requires police overreaching as a predicate to exclude a defendant's confession, Respondent submits that where, as here, the police arrest and interrogate an incompetent defendant who is powerless to exercise his constitutional rights and to protect himself, the police actions must be considered overreaching in nature and the use of such confession at trial fundamentally unfair. Indeed, if such is not true, the Constitution effectively affords an incompetent criminal defendant fewer rights than a competent defendant, a truly incomprehensible result.

As recognized in Blackburn v. Alabama, 361 U.S. 199 (1960), the police simply should not be allowed to take advantage of a criminal defendant's incompetency and extract evidence from him that he otherwise would not provide if afforded counsel or allowed the benefit of his constitutional rights. Indeed, if the State through its police force is not prohibited from taking advantage of an incompetent person in such circumstances, the State will be allowed to assume wholly inconsistent positions toward its incompetent citizens. For instance, the State would on one hand protect its incompetent citizens from others in civil actions arising out of the incompetent person's improvident exercise of his civil rights, see, e.g., Fla. Stat.§ 744.331 (8) (1986)(rendering contracts or gifts made by an incompetent person void), while on the other hand refusing to provide similar protection in the context of criminal actions and, in fact, allowing the prosecution of such persons based upon statements elicited by the State while the citizen was unable to understand and appreciate either his constitutional rights or the nature of the proceedings involved. Respondent submits that such action by

the State is both overreaching and fundamentally unfair.

Finally, Respondent submits that the cases in which this Court has noted the requirement that a defendant "knowingly and intelligently" waive his constitutional rights are legion. In Miranda v. Arizona, for example, this Court acknowledged that even if the police undertook no improper acts to coerce a confession from a criminal defendant, a defendant's confession made during custodial interrogation is admissible only after the State establishes "that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to retained or appointed counsel." 384 U. S. at 475 (emphasis added). See also Colorado v. Spring, ____ U. S.____, 107 S.Ct. 851 (1987); Moran v. Turbine, 475 U.S. 412 (1986); Edwards v. Arizona, 451 U.S. 477, 482 (1981) ( "It is reasonably clear from our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege..."); Tague v. Louisiana, 444 U.S. 469 (1980); North Carolina v. Butler, 441 U.S. 369, 373 (1979) ("An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case.") (Emphasis added).

This Court in Johnson v. Zerbst, 304 U.S. 458, 464 (1938) long ago established the standard for determining whether a valid waiver existed.

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination

> whether there has been an intelligent waiver ...must depend in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

Petitioner seeks, however, to strip this requirement and standard from our nation's jurisprudence and to substitute in its place[3] a new standard of "objective manifestation" of waiver. This "see no evil" approach to the admissibility of inculpatory statements made by incompetent criminal defendants is untenable and must be rejected. Simply stated, an incompetent defendant held for interrogation effectively is stripped of all meaningful rights and is helpless to defend himself from any statements the police might elicit from him. To hold that statements made by such a criminal defendant during custodial interrogation are admissible at trial as long as the defendant appears "normal" when making the statement must constitute the very same type of procedure found abhorrent and unconstitutional by this Court in Blackburn v. Alabama.

Indeed, the fundamental unfairness of this procedure must be considered no less than had the police failed to inform a competent defendant of his constitutional rights, a procedure again condemned by this Court in Miranda v. Arizona; in both

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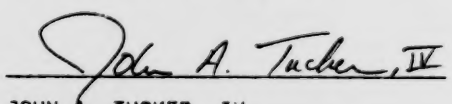
[3] Despite Petitioner's desire to utilize an objective standard to determine whether a waiver is valid -- a procedure presumably suggested to assist police officers -- Petitioner acknowledges that police officers are not trained to detect whether an incompetent defendant exhibits the capacity to understand and waive his constitutional rights, and that it is unreasonable to require police officers to attempt to do so. Petitioner's new standard, however, would presumably place this duty squarely with the interrogating officer. Respondent submits that this evaluation is more properly and effectively performed within the court system aided by the testimony of expert witnesses at the time the State attempts to introduce the statement into evidence at trial.

instances neither defendant is aware of and therefore able to exercise his constitutional rights knowingly and intelligently. To ensure the same fundamental fairness and freedom from self incrimination to incompetent defendants as guaranteed to competent defendants, this Court must reject the new standard proposed by the Petitioner and continue to require that an allegedly incompetent criminal defendant, whether apparently sane or obviously incompetent, actually make a knowing and intelligent waiver of his constitutional rights before admitting any custodial statements into evidence at trial.

## CONCLUSION

For the foregoing reasons, Respondent submits that the Court should deny the petition for writ of certiorari and allow the mandate of the United States Court of Appeals for the Eleventh Circuit to issue.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, JOHN A. TUCKER, IV, counsel for the Respondent, certify that my application to the Bar of the United States Supreme Court is currently pending with the Clerk of the Court; I further certify that on the 23rd day of May, 1988, I served three copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari on ROBERT J. KRAUSS, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammel Building, Tampa, Florida, 33602, by United States Mail in a duly addressed envelope with first class postage prepaid.

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